Catholic University Law Review

Volume 41
Issue 3 *Spring 1992*

Article 6

1992

Giving Property All the Process That's Due: A "Fundamental" Misunderstanding About Due Process

Craig W. Hillwig

GIVING PROPERTY ALL THE PROCESS THAT'S DUE: A "FUNDAMENTAL" MISUNDERSTANDING ABOUT DUE PROCESS

Section 1 of the Civil Rights Act of 1871, codified at 42 U.S.C. § 1983,[1] creates a cause of action in the federal courts, ostensibly for the full scope of constitutional claims[2] cognizable under the Fourteenth Amendment.[3] The Supreme Court holds that § 1983 supports three types of claims[4] under the Due Process Clause of the Fourteenth Amendment, which guarantees that the state shall not deprive a person of life, liberty, or property without "due process:"[5] procedural due process, which addresses the guarantee of procedural fairness;[6] violations of the specific guarantees found in the Bill of Rights, as they are selectively incorporated for application to the states;[7] and claims brought under a "substantive" component of the clause that bars arbitrary or wrongful abuses of government power.[8] This Comment focuses on the application of due process to redress arbitrary and capricious deprivations of property interests.

Historically, state-effected deprivations of constitutionally-protected "property rights"—those interests that rise to the level of a "legitimate claim of entitlement"[9]—trigger inquiry into whether the state utilized constitutionally adequate procedures to effect the deprivation.[10] The Supreme Court has usually held that "procedural" due process requires the state to afford

1. 42 U.S.C. § 1983 (1988) provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2. Monroe v. Pape, 365 U.S. 167, 171 (1961).

3. U.S. CONST. amend. XIV, § 1.

4. Zinermon v. Burch, 494 U.S. 113, 125 (1990).

5. U.S. CONST. amend. XIV, § 1. Section 1 provides, in relevant part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."

6. *Zinermon*, 494 U.S. at 125; *see infra* text accompanying notes 28-43.

7. *Id.*; *see infra* text accompanying notes 55-65.

8. *Id.*; *see infra* text accompanying notes 74-82.

9. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9 (1978), *see infra* notes 33-35 and accompanying text.

10. Reich v. Beharry, 883 F.2d 239, 243 (3d Cir. 1989).

both notice and a hearing before depriving a person of a protected property interest.[11]

A major exception to the pre-deprivation procedure requirement arises where the deprivation results from a "random and unauthorized act of a state employee."[12] When this occurs, the state cannot possibly predict such an act, making the implementation of pre-deprivation safeguards impossible.[13] In such situations, a meaningful post-deprivation remedy at state law provides a § 1983 plaintiff with constitutionally adequate process.[14] This exception is commonly known as the *Parratt* rule.[15] Application of the *Parratt* rule abrogates the procedural due process claim, because that claim is based on a state's failure to provide constitutionally adequate process and not on the erroneous deprivation of the protected property interest.[16]

Due process violations, however, can also occur when an arbitrary or wrongful deprivation occurs, regardless of the adequacy of the state's deprivation procedures.[17] The Supreme Court readily recognizes these "substantive" due process challenges to statutory or regulatory schemes that affect property rights.[18] In cases where a plaintiff merely challenges arbitrary official conduct that effects a deprivation, however, the Court's opinions fail to provide coherent guidelines for analysis of the claim at issue.[19] Consequently, the lower federal courts have little direct guidance on whether and under what circumstances arbitrary and capricious deprivations of property rights implicate due process concerns.[20] The United States courts of appeals, navigating through "an area of the law famous for its controversy, and

11. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985); Parham v. J.R., 442 U.S. 584, 606-07 (1979); *Craft*, 436 U.S. at 18; Goss v. Lopez, 419 U.S. 565, 579 (1975); Wolff v. McDonnell, 418 U.S. 539, 540-41 (1974).

12. Parratt v. Taylor, 451 U.S. 527, 541 (1981), *overruled by* Daniels v. Williams, 474 U.S. 327 (1986) (overruling *Parratt's* application of § 1983 to negligent deprivations); Davidson v. Cannon, 474 U.S. 344 (1986) (same).

13. Zinermon v. Burch, 494 U.S 113, 129 (1990).

14. *Id.* at 128.

15. *See infra* notes 44-50 and accompanying text.

16. *Zinermon*, 494 U.S. at 125.

17. *Id.*

18. *See infra* notes 80-81 and accompanying text. The Supreme Court has usually applied substantive due process to property deprivations when reviewing challenges to the statutory basis authorizing the state action. *Id.* For example, where the plaintiff challenges a zoning ordinance, the Court will uphold the ordinance as a valid exercise of the state's police power unless it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

19. Kauth v. Hartford Ins. Co. of Ill., 852 F.2d 951, 957 (7th Cir. 1988) (explaining the lack of Supreme Court guidance).

20. *Id.*

not known for its simplicity,"[21] are understandably split on the proper analysis, and disagree on the question of whether every property interest implicates substantive due process protection against arbitrary deprivations.[22] Some circuit courts dichotomize the treatment of property interests on the basis of whether an interest is "fundamental," and refuse to recognize substantive due process protection for property interests that lack such "fundamental" import.[23] Other circuit courts will recognize the claim, but differ on the circumstances under which these claims are cognizable.[24] As a result, due process claims for arbitrary deprivations of property by a government actor are cognizable only in selected forums. Thus, the Supreme Court needs to provide a coherent analytical framework for this "substantive" aspect of due process.[25]

This Comment examines the circuit courts' development of differing approaches to the due process guarantee against arbitrary property deprivations. The divergent analyses present two problematic questions: whether substantive due process protects all property interests from arbitrary depri-

---

21. Schaper v. City of Huntsville, 813 F.2d 709, 716 (5th Cir. 1987).

22. *See Kauth*, 852 F.2d at 957 (collecting cases).

23. *See* Reich v. Beharry, 883 F.2d 239 (3d Cir. 1989), discussed *infra* notes 142-55 and accompanying text; *see also* Charles v. Baesler, 910 F.2d 1349 (6th Cir. 1990), discussed *infra* notes 156-66 and accompanying text.

24. *See Schaper*, 813 F.2d at 709, discussed *infra* notes 169-84 and accompanying text; *see also Kauth*, 852 F.2d at 951, discussed *infra* notes 185-99 and accompanying text.

25. "Substantive due process" is a problematic term because the Supreme Court has used the term as a vehicle for protecting certain interests the Court deems "important," "fundamental," or pertaining to "liberty" by placing such interests in a "preferred position." *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY 269 (1977). For example, at the turn of the century, the Court deemed "liberty of contract" important, and used the Due Process Clause to strike down economic legislation. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA 43-49 (1990). In the New Deal years 1934-1938, the Court repudiated this "economic due process" doctrine, known derisively as "Lochnerizing" (derived from Lochner v. New York, 198 U.S. 45 (1905), *overruled by* Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952); Ferguson v. Skrupa, 372 U.S. 726 (1963)). BORK, *supra*, at 44, 57-58. The Court also uses "substantive due process" when it applies to the states select, important guarantees found in the Bill of Rights. *See infra* notes 56-65 and accompanying text. In yet another sense, the Court uses "substantive due process" to erect stringent barriers to the infringement of "fundamental" personal interests the Court has elevated to a "preferred position." The privacy rights protected in the contraception and abortion cases illustrate this approach. *See infra* notes 66-73 and accompanying text.

The debate over the propriety of the Court's approach to "substantive due process" is extensive. The Court's "preferred position" approach to constitutional interpretation is criticized for failing to limit due process to the framers' intent—the so-called "original understanding." *See generally* BORK, *supra*, at 143 (postulating that "only the approach of original understanding . . . is consonant with the design of the American Republic"). The liberal justification for the Court's approach, as articulated by Justice Brennan, is that constitutional interpretation should be sensitive "to both transformations of social condition and evolution of our concepts of human dignity." *Id.* at 219 (footnote omitted).

vation and, if so, under what circumstances. Particularly provocative is the debate over whether the *Parratt* rule—a procedural due process doctrine—bars substantive due process claims for arbitrary government action.

This Comment begins with a brief overview of the § 1983 claims available under the Due Process Clause of the Fourteenth Amendment. This section describes the elements of "procedural" due process, focusing on the nature of state-created property rights and the scope of the procedural protection triggered by a state-effected deprivation of these rights. Next, this section discusses the *Parratt* rule, the reasons for its adoption, and the present reach of the rule. This section then provides a summary outline of the "substantive" due process models. First, this discussion summarizes the component of the Clause through which the Supreme Court has elevated certain important interests to "fundamental" status, including certain guarantees found in the Bill of Rights. Second, it introduces the Supreme Court precedent that applies the "arbitrary and capricious" government action standard to deprivations of property.

This Comment next examines the differing approaches of the circuit courts in cases of § 1983 claims for arbitrary and capricious deprivations of property interests. Through a discussion of illustrative cases, this section divides the circuit court treatment into three approaches: those circuit courts which readily apply the arbitrary and capricious standard to property deprivations; those circuit courts that refuse to apply substantive due process to less-than-fundamental property interests; and those circuit court approaches holding that the *Parratt* rule can bar a due process claim for arbitrary action.

This Comment then attempts to square the differing circuit court approaches with the larger notion of due process. This Comment concludes that the Due Process Clause protects all property interests from the arbitrary exercise of government power, despite the relative significance of the interest. This Comment further concludes that the correct application of the *Parratt* doctrine bars the substantive due process claim. Finally, this Comment advocates the use of traditional procedural due process analysis to determine the existence of a due process violation.

I. DUE PROCESS PRIMER: PROCEDURAL FAIRNESS AND SUBSTANTIVE RIGHTS

The Supreme Court separates the Due Process Clause into three distinct components with respect to § 1983 claims.[26] Contemporary scholars often attempt to integrate due process by focusing on inconsistencies in the definitions of due process theory as they are applied across the three components.[27] Similarly, this Comment looks toward an integrated perspective of Fourteenth Amendment due process, and seeks to reconcile apparently inconsistent approaches to the guarantee of due process for the deprivation of property. Thus, a brief overview of fairly settled due process jurisprudence is a necessary foundation for this analysis.

A. Due Process as a Guarantee of Procedural Fairness

The "procedural" component of the Due Process Clause[28] guarantees that the state shall not deprive a person of property without "constitutionally adequate" process.[29] Where a plaintiff alleges a procedural due process violation premised on a deprivation of property, the court performs a two-pronged test. The first inquiry is whether the state-created interest constitutes "property" protected by the Clause.[30] The second determination is whether the state's deprivation procedure is "constitutionally adequate."[31]

Property interests are created and defined by non-constitutional, state-created sources such as statutes, rules, and understandings.[32] The Supreme

26. Zinermon v. Burch, 494 U.S. 113, 125 (1990). Due process also encompasses issues outside of the scope of § 1983 such as personal jurisdiction. *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

27. *See, e.g.*, Henry P. Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 COLUM. L. REV. 979 (1986); Sheldon H. Nahmod, *Due Process, State Remedies, and Section 1983*, 34 KAN. L. REV. 217 (1985); Michael Wells and Thomas A. Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201 (1984). These articles discuss due process and the *Parratt* rule from both procedural and substantive due process perspectives and seek to define *Parratt*—a procedural due process doctrine—in an attempt to examine its ramifications for substantive due process.

28. The "procedural" component is due process in its truest historical sense. Professor Berger reported that "[i]t has been convincingly shown that due process was conceived in utterly procedural terms, specifically, that a defendant must be afforded an opportunity to answer by service of process in proper form, that is, in due course." BERGER, *supra* note 25, at 197.

29. *Zinermon*, 494 U.S. at 126.

30. *Id.* at 125.

31. *Id.* at 126.

32. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985). In *Loudermill*, the Court recognized that Ohio Civil Service employees had a property interest in continued employment where the civil service statute authorized termination only for cause. *Id.* at 538-39. Less formal schemes are equally valid sources of property rights. For example, the United

Court has recognized several different types of "property:" "[t]angible [t]hings" such as a parcel of land; the "bundle" of economically valuable legal rights incident to ownership of land; and "positive" state law[33] that forms the basis for legally-enforceable expectancies against the state.[34] The Court's preferred phraseology for expectancy-based interests is "legitimate claim of entitlement."[35]

Once a court determines that an interest constitutes property, the state may not deprive a person of the interest without providing constitutionally adequate procedural safeguards to prevent erroneous deprivations.[36] Thus, the question becomes "what process is due?"[37] The Supreme Court has usually held that due process requires the state to afford pre-deprivation process in the form of some notice and opportunity to be heard.[38] The Court, however, has tempered this requirement by applying a flexible, three factor test enunciated in *Mathews v. Eldridge*.[39] Accordingly, in certain situations, pre-

---

States Court of Appeals for the Third Circuit held that a school teacher candidate had a protected property interest in remaining on the school district's hiring-eligibility list. Stana v. School Dist. of Pittsburgh, 775 F.2d 122, 126 (3d Cir. 1985). The *Stana* court based this determination on testimony that the school district had a policy of keeping eligible persons on the list "for at least two years." *Id.*

33. Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principals Part I—A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1301, 1308-10, 1310 n.41, 1311-16 (1989).

34. O'Bannon v. Town Court Nursing Ctr., 447 U.S. 773, 778 n.21 (1980) (examining a claim of a property right under Medicare); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9 (1978) (finding a property interest in continued utility service). Mandatory language in a state statute or rule, or substantive restrictions on the state's use of power respecting an interest, gives people a right to rely on the continued enjoyment of these interests free from "unfettered" official discretion. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-10, at 698-99 (2d ed. 1987).

35. *Craft*, 436 U.S. at 9. The Court's guidance on what constitutes a "legitimate claim of entitlement" is largely in the form of example. One test advocated by the Court defines entitlement-based property interests as those "which cannot be removed except 'for cause.' Once that characteristic is found, the types of interests protected as 'property' are varied and, as often as not, intangible, relating to 'the whole domain of social and economic fact.' " Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982) (citations omitted) (quoting National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting)).

36. "While the legislature may elect not to confer a property interest . . ., it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." *Loudermill*, 470 U.S. at 541 (quoting Arnett v. Kennedy, 416 U.S. 134, 167 (1974) (Powell, J., concurring)).

37. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

38. *See supra* note 11. The Court has consistently held that pre-deprivation process is the "root requirement" of the Clause. Boddie v. Connecticut, 401 U.S. 371, 379 (1971).

39. 424 U.S. 319 (1976). The Court weighs three factors to determine, under the circumstances, the procedural protection that due process requires:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the

deprivation process is not a constitutional requirement and a post-deprivation remedy at state law can satisfy due process.[40] Governmental exigency[41] or mere impracticality of providing pre-deprivation process[42] may mean that a state judicial remedy provides a plaintiff with all of the process that is due.[43]

One particular species of the impracticality exception is the *Parratt* rule.[44] In *Parratt v. Taylor*,[45] a prisoner brought suit under § 1983 alleging a due process violation where a prison employee negligently lost the prisoner's mail-order hobby kit.[46] The Court reasoned that the State could not anticipate such a "random and unauthorized act"[47] and, under these circumstances, the State could not predict when the erroneous deprivation would occur.[48] In such cases, the Court held, pre-deprivation process would be impracticable or even impossible to provide. Thus, a meaningful post-deprivation tort remedy at state law can satisfy due process,[49] because this type of remedy is the only process the state can be expected to provide under the circumstances.[50]

Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

40. Zinermon v. Burch, 494 U.S. 113, 128 (1990).

41. For example, when a state breaches a dam in order to alleviate the risk of imminent flooding, the "need to act promptly and decisively" vitiates the pre-deprivation process requirement. Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1406 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990).

42. *See infra* note 50.

43. "Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate." Phillips v. Commissioner, 283 U.S. 589, 596-97 (1931) (Brandeis, J.) (citation omitted), *quoted in* Parratt v. Taylor, 451 U.S. 527, 540 (1981).

44. The rule stems from *Parratt* and its subsequent line of significant limiting and clarifying cases. *See Zinermon*, 494 U.S. at 113; Daniels v. Williams, 474 U.S. 327 (1986); Hudson v. Palmer, 468 U.S. 517 (1984); Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

45. 451 U.S. 527 (1981).

46. *Id.* at 529.

47. *Id.* at 541.

48. *Id.*

49. The Court's preference for pre-deprivation process only addresses what is arguably the first prong of the inquiry, the timing of the process. TRIBE, *supra* note 34, § 10-14, at 719. Also relevant are the inquiries into the fundamental fairness of the process, such as the adequacy of notice and formality of procedures. *Id.* § 10-15, at 732-33. Thus, *Parratt* apparently addresses the timeliness aspect of constitutionally adequate process. *See* Monaghan, *supra* note 27, at 984.

50. The unpredictability of "random or unauthorized acts" that render pre-deprivation process impracticable determines whether *Parratt* applies to a procedural due process claim; it is this impracticality that is integrated into the *Mathews* analysis. Zinermon v. Burch, 494 U.S. 113, 129 (1990). The Court's recent opinion in *Zinermon* revealed that unforeseeable deprivations are ostensibly impossible to prevent and, thus, "the value of pre-deprivation safe-

B. "Substantive" Due Process

The "substantive" component of the Due Process Clause protects personal interests created not by the state, but by the Constitution itself.[51] Substantive due process claims available under § 1983 take two general forms.[52] First, the Clause protects from infringement certain "fundamental rights," including some important interests based on the Bill of Rights.[53] Second, the Clause functions independently to proscribe arbitrary government action.[54]

1. Fundamental Rights: Incorporation of the Bill of Rights and the Protection of Important Liberties

Some legal scholars describe the Supreme Court's application of the Bill of Rights to the states as "selective incorporation."[55] Selective incorporation generally refers to the application of the Bill of Rights not in their entirety,[56] but selectively through Supreme Court determinations that certain interests in the Bill of Rights are "fundamental."[57] Rights are fundamental, for the

---

guards . . . is negligible in preventing the kind of deprivation at issue. Therefore, no matter how significant the private interest at stake and the risk of its erroneous deprivation, the State cannot be required constitutionally to do the impossible by providing pre-deprivation process." *Id.* (citation omitted). Accordingly, a post-deprivation remedy alone satisfies due process and is relevant only when pre-deprivation process is not a constitutional requirement. Failure to provide an adequate post-deprivation remedy in this instance results in a constitutional violation. *Id.* at 126.

51. Regents of Univ. of Michigan v. Ewing, 474 U.S. 214, 229 (1985) (Powell, J., concurring). This statement may be misleading. In many cases the Supreme Court has interpreted the Constitution to protect "important" interests which, from an "original understanding" perspective, are extra-constitutional. *See supra* note 25; *see also* BERGER, *supra* note 25, at 269-82 (explaining how the Court's "preferred position" approach diverges from framer intent).

52. *Zinermon*, 494 U.S. at 125.

53. *Id.*

54. *Id.*

55. *See, e.g.*, GERALD GUNTHER, CONSTITUTIONAL LAW 414-15 (12th ed. 1991). TRIBE, *supra* note 34, § 11-2, at 772-73.

56. Justice Black advocated this "full incorporation" perspective in Adamson v. California, 332 U.S. 46, 74-75 (1947) (Black, J., dissenting), *overruled by* Malloy v. Hogan, 378 U.S. 1 (1964). The "full incorporation" approach has never been adopted by the Court. TRIBE, *supra* note 34, § 11-2, at 772-73.

57. Duncan v. Louisiana, 391 U.S. 145, 148-50 n.14 (1968). The Court's incorporation approach in essence applies to the states those aspects of the Bill of Rights guarantees important to the Justices on the Court:

> The controversy over the legitimacy of incorporation continues to this day, although as a matter of judicial practice the issue is settled. Nevertheless, the application of the states of the Bill of Rights enormously expanded the Court's power. That meant *making its interpretations of the various amendments the uniform law throughout the nation.*

purposes of Fourteenth Amendment incorporation, when the right is determined to be "implicit in the concept of ordered liberty."[58] Thus, many of the rights embodied in the specific guarantees of the First,[59] Fourth,[60] Fifth,[61] Sixth,[62] and Eighth[63] Amendments apply to the states.[64] Under an incorporation perspective, substantive due process violations are analyzed as a violation of the incorporated right and not as a violation of substantive due process.[65]

BORK, *supra* note 25, at 94 (emphasis added); *see infra* note 64.

58. Palko v. Connecticut, 302 U.S. 319, 325 (1937). Subsequent articulations describe the incorporation standard as "basic in our system of jurisprudence," In re Oliver, 333 U.S. 257, 273 (1948), and "necessary to an Anglo-American regime of ordered liberty." *Duncan*, 391 U.S. at 149-50 n.14.

The "privacy cases" bear note here. In Griswold v. Connecticut, 381 U.S. 479 (1965), Justice Douglas found justification for the protection of privacy in the "penumbra" of privacy "emanating" from the Bill of Rights. *Id.* at 484. RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW, SUBSTANCE AND PROCEDURE, § 15.7, at 80 (1986). Critics of the Douglas approach argue that the Court had merely "Lochnerized" the issue by protecting privacy as an important "fundamental" interest, placing privacy in a preferred position. *See supra* note 25; ROTUNDA ET AL., *supra*, § 15.7, at 80; Brett J. Williamson, Note, *The Constitutional Privacy Doctrine After* Bowers v. Hardwick: *Rethinking The Second Death of Substantive Due Process*, 62 S. CAL. L. REV. 1297, 1309-10 (1989). The debate continues in the abortion cases, beginning with the Court's extension of "fundamental" privacy rights in Roe v. Wade, 410 U.S. 113 (1973). Williamson, *supra*, at 1310.

59. *See, e.g.*, Fiske v. Kansas, 274 U.S. 380, 387 (1927) (applying due process protection to freedom of speech); Near v. Minnesota, 283 U.S. 697, 707 (1931) (extending freedom of the press); De Jonge v. Oregon, 299 U.S. 353, 364 (1937) (protecting the right to peaceably assemble); Hague v. CIO, 307 U.S. 496, 517-18 (1939) (protecting the right to petition); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (protecting the free exercise of religion); Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947) (extending the prohibition against government establishment of religion).

60. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961) (extending the exclusionary rule to state courts).

61. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1, 6 (1964) (extending the freedom against compelled self-incrimination); Benton v. Maryland, 395 U.S. 784, 794 (1969) (incorporating the protection against "double jeopardy").

62. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 148-49 (1968) (extending the right to jury trial); Gideon v. Wainwright, 372 U.S. 335, 342-43 (1963) (incorporating the right to counsel in criminal trials).

63. *See, e.g.*, Robinson v. California, 370 U.S. 660, 667-68 (1962) (applying due process to "cruel and unusual punishment").

64. For the purposes of Fourteenth Amendment incorporation, the Court incorporates not the amendments per se, but the "fundamental" rights embodied in the amendments. For example, the Court has held that although the Sixth Amendment affords criminal defendants a right to a jury in both state and federal trials, conviction in federal court must be by a unanimous jury, while state court convictions need not. Johnson v. Louisiana, 406 U.S. 356, 369-80 (1972). Thus, "the Bill of Rights provisions remain points of reference only." TRIBE, *supra* note 34, § 11-2, at 773 n.25.

65. Graham v. Connor, 490 U.S. 386, 393-94 (1989). In *Graham*, the Court held that a § 1983 suit based on a police brutality claim should have been framed as a Fourth Amendment

The Court resorts to the "fundamental interests" inquiry utilized in questions of incorporation[66] to afford heightened protection for certain liberties the Court finds important.[67] The Court holds a liberty interest "fundamental" if it is one "historically and traditionally protected against state interference."[68] For example, the Court has afforded "fundamental" status to rights of "privacy,"[69] interstate travel,[70] and the right to vote.[71] A state's attempted abridgement of a "fundamental" right triggers heightened judicial scrutiny[72]—a less deferential standard than the Court's review for arbitrariness.[73]

"seizure" rather than a substantive due process violation based on brutal, malicious conduct. *Id.*

66. A plurality Court noted that "[a]ppropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society.' " Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion) (quoting Griswold v. Connecticut, 381 U.S. 479, 501 (1965)). "A similar restraint marks our approach to questions . . . whether or to what extent a guarantee in the Bill of Rights should be 'incorporated' in the Due Process Clause." *Id.* at n.10.

67. *See, e.g.*, *Moore*, 431 U.S. at 499 (applying the liberty interest in choices concerning family living arrangements); Roe v. Wade, 410 U.S. 113 (1973) (finding a liberty interest in a woman's choice to obtain an abortion); *Griswold*, 381 U.S. at 479 (holding the "right to privacy" a fundamental liberty). These cases considered whether the interests involved were fundamental and thus qualified for increased protection under the Due Process Clause. *See supra* notes 25, 58.

68. Cruzan v. Director, Mo. Dept. of Health, 110 S. Ct. 2841, 2859-60 (1990) (Scalia, J., concurring) (citations omitted). Different articulations run throughout the Court's opinions. *See id.* at 2856 (O'Connor, J., concurring) (commenting that "our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination"); *see also* Bowers v. Hardwick, 478 U.S. 186, 192 (1986) (describing fundamental liberties as those "deeply rooted in this Nation's history and tradition") (quoting *Moore*, 431 U.S. at 502-03).

69. *See supra* note 58. The privacy right itself is expansive, and encompasses a range of personal and family decisions. *See* ROTUNDA ET AL., *supra* note 58, § 15.7, at 85.

70. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 629-30 (1969) (holding the right to interstate travel fundamental), *overruled by* Edelman v. Jordan, 415 U.S. 651 (1974) (overruling Shapiro's implication that the Eleventh Amendment does not bar certain retroactive relief).

71. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667 (1966) (applying the equal protection clause to a state infringement on the right to vote).

72. For example, the *Roe* Court held that state abortion laws are subject to "strict scrutiny," a standard that requires the state to demonstrate that its law is "necessary" to promote a "compelling" governmental interest. Roe v. Wade, 410 U.S. 113, 155 (1973); ROTUNDA ET AL., *supra* note 58, § 18.29, at 190 (Supp. 1991). In *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), the Court redefined the right it announced in *Roe* and adopted an "undue burden" analysis for determining the infringement of that right. *Id.* at 2816-22.

73. Under a review for arbitrariness, the government act need only be "rational;" the government interest, only "legitimate." *Id.* § 18.1, at 316 (discussing the difference among levels of deference under equal protection analysis which, with respect to "fundamental" rights, differs from due process only in that equal protection analysis involves a class distinction).

2. *Protection From the Arbitrary Imposition of Government Power*

Protection from arbitrary, unjust government is fundamentally and historically rooted in the concept of "due process."[74] However, the government *may* deprive persons of life, liberty, and property so long as the deprivation is accompanied by due process.[75] Due process is valued for three reasons: it requires the implementation of some procedure that slows government down; it allows individuals to participate in the deprivation process; and it requires government to justify its actions.[76]

The Due Process Clauses of the Fifth and Fourteenth Amendments preserve this understanding of due process by barring "certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.' "[77] Procedural due process, as the Supreme Court uses the term, refers to the requirement that government establish procedures

---

74. *See* Charles A. Miller, *The Forest of Due Process Law: The American Constitutional Tradition*, *in* NOMOS XVIII: DUE PROCESS 3, 4-5 (J. Roland Pennock & John W. Chapman eds., 1977). Professor Miller traces the concept of due process from its conception in the Magna Carta.

75. Hence the guarantee that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

76. *See* Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, *in* NOMOS XVIII: DUE PROCESS, *supra* note 74, at 126, 127. Professor Michelman wrote:

> Due process rights . . . depend on preexisting legal entitlements. These entitlements are not absolute claims which override all possible counterarguments, but rather are claims triggering requirements for some sort of justification—where justification means an objectively verifiable account of a person's conduct or the circumstances attending it, the truth of which will absolve conduct of legally wrongful quality despite its harmfulness to another.

Id. at 132.

77. Zinermon v. Burch, 494 U.S. 113, 125 (1990) (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)). In Poe v. Ullman, 367 U.S. 497 (1961), Justice Harlan advocated an expansive view of the Clause that recognizes the due process protection of less-than-fundamental interests:

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

Id. at 543 (Harlan, J., dissenting). A plurality Court quoted Justice Harlan's view with approval in Moore v. East Cleveland, 431 U.S. 494, 502 (1977). *Graham v. O'Connor*, therefore, when read in conjunction with the above cited quotes from *Zinermon* and *Poe*, offers contemporary support for Justice Harlan's view that due process independently affords a substantive freedom from an "arbitrary imposition" of government power. *See supra* note 65 and accompanying text.

giving persons notice and an opportunity to be heard upon being deprived of a protected interest.[78] Substantive due process, as the Court has sometimes used the term, refers to the requirement that government must have a good reason—a rational basis—for the deprivations it effects.[79]

In cases involving deprivations of property rights, substantive due process claims are usually leveled at statutory or regulatory schemes enacted pursuant to the state's "police power."[80] It is well settled, for example, that a state may constitutionally implement land use regulations that are not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[81] However, in cases where the plaintiff does not challenge the statutory scheme affecting a property

78. Goss v. Lopez, 419 U.S. 565, 579 (1975) (reflecting the Court's preference for "notice" and "an opportunity to be heard"). *See supra* note 38 and accompanying text.

79. Professor Scanlon notes that "[d]ue process is . . . one of the strategies through which one may seek to avoid arbitrary power by altering the conditions under which decisions are made." T.M. Scanlon, *Due Process, in* NOMOS XVIII: DUE PROCESS, *supra* note 74, at 93, 97. However, Professor Scanlon categorizes the protection against arbitrary government as a type of *procedural* due process, and characterizes a reviewing court as "one of the appeals stages in an established system of due process." *Id.* at 101.

80. Most familiar are those schemes that restrict land use. The Court has applied a "rational basis" test to determine whether the statute is arbitrary, or whether it is rationally related to a valid state interest. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 373 (1926). *But see infra* note 81.

81. *Euclid*, 272 U.S. at 395. A landowner who wishes to challenge a land-use regulation can do so on two grounds. First, the landowner can attack the regulation as a deprivation of property without due process. *Id.* Second, the landowner can allege that the regulation constitutes a "taking" for which compensation is required under the Fifth Amendment. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 138 n.36 (1978). The Court's "regulatory takings" analysis is not settled. In *Penn Central*, the Court confused due process analysis with takings analysis. Margaret Lang, Penn Central Transportation Co. v. New York City*: Fairness and Accommodation Show the Way Out of the Takings Corner*, 13 URB. LAW. 89, 92-93 (1981).

In Agins v. Tiburon, 447 U.S. 255, 260 (1980), the Court posited a two-prong test, holding that a "taking" occurs when a valid regulation "denies an owner economically viable use of his land," *or* where the regulation fails to "substantially advance legitimate state interests." *Id.* at 260. *See* Nathaniel S. Lawrence, *Means, Motives and Takings: The Nexus Test of* Nollan v. California Coastal Commission, 12 HARV. ENVTL. L. REV. 231 (1988). In a series of cases decided during the 1986-1987 term, the Court intimated that it was subjecting regulations to a heightened level of scrutiny under the second prong. *Id.* at 238-39; *see also* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987); Hodel v. Irving, 481 U.S. 704 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987). *See generally*, Seth E. Zuckerman, Loveladies Harbor, Inc. v. United States*: The Claims Court Takes a Wrong Turn—Toward a Higher Standard of Review*, 40 CATH. U. L. REV. 753, 771-77 (1991) (comparing the different formulations of the Supreme Court's takings analysis).

right, the Supreme Court's precedent provides little direct guidance for examining an "arbitrary and capricious" claim.[82]

II. Implying the Protection for Property Interests

The Supreme Court has considered substantive due process claims for property deprivations outside the context of a challenge to a statute or regulation. In a somewhat false start, the Supreme Court glossed over the issue in *Harrah Independent School District v. Martin*.[83] In *Harrah*, the school board declined to renew a tenured instructor's employment contract after she repeatedly refused to comply with a continuing education requirement in the contract.[84] Originally, the school district withheld pay as a sanction for nonperformance of the continuing education clause.[85] Contract non-renewal was implemented prospectively after Martin received tenure.[86] The board informed Martin that it would not renew her contract and afforded a hearing with her attorney present.[87] At the hearing, Martin argued that the board could not refuse to renew her contract because contract non-renewal was implemented subsequent to her tenure and operated only prospectively.[88] The district court dismissed Martin's claim that the board's application of the sanction violated due process.[89] The United States Court of Appeals for the Tenth Circuit reversed, holding that although Martin had no protected liberty interest, the school board's arbitrary and capricious refusal to renew her contract violated due process.[90]

The Supreme Court, in reversing the Tenth Circuit, noted that the interest asserted was unlike the fundamental interests asserted in other substantive due process claims it had previously considered.[91] The Court emphasized that the claim was only that the school board could not, consistent with due

82. Kauth v. Hartford Ins. Co. of Ill., 852 F.2d 951, 956 (7th Cir. 1988). In such cases, the property interests in question are entitlement-based interests, interests which normally trigger procedural due process analysis. *Id.*

83. 440 U.S. 194 (1979) (per curiam).

84. *Id.* at 196.

85. *Id.* at 197.

86. *Id.*

87. *Id.*

88. *Id.* at 198.

89. The district court ruled, on the basis of the stipulated evidence, that Harrah failed to state a due process claim. *Id.* at 196.

90. *Id.* at 196-97. Martin v. Harrah Indep. Sch. Dist., 579 F.2d 1192, 1200 (10th Cir. 1978), *rev'd*, 440 U.S. 194 (1979) (per curiam). The circuit court reasoned that the school board's "arbitrary and capricious" dismissal "violated . . . notions of fairness embodied in the Due Process Clause generally." *Id.*

91. *Harrah*, 440 U.S. at 198. The Court found no resemblance between the asserted claim and "the individual's freedom of choice with respect to certain basic matters of procreation, marriage, and family life." *Id.* (quoting Kelly v. Johnson, 425 U.S. 238, 244 (1976)).

process, arbitrarily apply the purely prospective sanction to Martin.[92] Rather than discussing the circumstances under which such a claim was cognizable, the Court held that Martin bore the burden of showing that the school board's action was not rationally related to its interest in maintaining the quality of its faculty.[93] In finding that Martin failed to meet that burden, the Court held that a rational relationship existed, and that consequently Martin could not claim a denial of substantive due process.[94]

In *Regents of University of Michigan v. Ewing*,[95] the Court considered a similar due process claim, but again failed to provide any guidelines for determining the existence of the due process right it applied. In *Ewing*, a student brought a § 1983 action against a state university, challenging his dismissal from an academic program.[96] The university's academic board reviewed Ewing's testing and research performance and voted to remove Ewing from the program.[97] Ewing appealed this decision to the university on several occasions, but the dismissal was upheld.[98]

Ewing then brought suit in district court, alleging as his only federal claim that the faculty arbitrarily dismissed him from the program in violation of due process.[99] The district court recognized the existence of such substantive claims,[100] but dismissed Ewing's claim on the merits, finding that the university had "good cause" to dismiss him.[101] The United States Court of Appeals for the Sixth Circuit reversed, holding that the dismissal was arbitrary in light of the university's stated qualification standards.[102] The

92. *Id.* The school district conceded the existence of a protected property interest. *Id.* at 197.

93. *Id.* at 198.

94. *Id.* at 199. The Court held that the application of the sanction by "a school board responsible for the public education of students within its jurisdiction, and employing teachers to perform the principal portion of that task, can scarcely be described as arbitrary." *Id.*

95. 474 U.S. 214 (1985).

96. *Id.* at 217.

97. *Id.* at 216. The six-year medical training program required the student to complete four years of undergraduate study and pass a comprehensive examination before advancing to the clinical training that comprised the final two years. *Id.* at 215. Ewing failed the comprehensive exam, receiving the lowest score in the history of the program. *Id.* at 216.

98. *Id.* at 216-17.

99. Ewing v. Board of Regents, 559 F. Supp. 791 (E.D. Mich. 1983), *rev'd*, 742 F.2d 913 (6th Cir. 1984), *rev'd*, 474 U.S. 214 (1985).

100. The district court ruled that Ewing had a property right in continued enrollment, and that therefore Ewing's dismissal was reviewable under a substantive due process standard. *Id.* at 799.

101. *Id.* at 800.

102. *Ewing*, 742 F.2d at 916. The university's program brochure stated that students would be permitted to retake the board examination that Ewing failed. *Ewing*, 474 U.S. at 219. The circuit court held that Ewing had a "contract right to continued enrollment free from arbitrary interference," and that this right constituted "property" for the purposes of the

Supreme Court granted certiorari to determine whether the circuit court misapplied substantive due process, and reversed.[103]

The Supreme Court did not consider whether Ewing had a protectable property interest in continued enrollment. Rather, the Court assumed the existence of a property right and that an arbitrary and capricious dismissal could constitute a due process violation.[104] The Court, however, reversed on the merits, holding that the record reflected no arbitrary university action.[105] Thus, the Court suggested that deprivations of property interests were reviewable under an "arbitrary and capricious" due process standard.[106] However, the Court failed to articulate a clear test for determining the circumstances that will trigger this "substantive" component of the Clause.

Justice Powell, in concurrence, sought to temper the unanimous Court's open-ended opinion.[107] He cautioned that not all state-created entitlements can support a substantive due process claim.[108] According to Justice Powell, the application of substantive due process should be governed by "caution and restraint."[109] He would limit the application to those "fundamental interests" that receive implied protection from the Court.[110] This caveat would prove very influential among some circuit courts.[111]

Due Process Clause. *Id.* at 221. The university did not permit Ewing to retest, but allowed seven other students to retake the examination. *Id.*

103. *Ewing*, 474 U.S. at 221.

104. *Id.* at 223.

105. *Id.* The Court found that the faculty's decision "was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing's academic career." *Id.* at 225.

106. Ivan E. Bodensteiner & Rosalie B. Levinson, *The Seventh Circuit Review—Developments in Civil Liberties: 1984-85 Term*, 63 CHI.-KENT L. REV. 425, 437 (1986).

107. *Ewing*, 474 U.S. at 228-30 (Powell, J., concurring). Justice Powell opined that academic decisions made by appropriate authorities should be subject to judicial review only in rare circumstances. *Id.* at 230.

108. *Id.* at 229.

109. *Id.* (quoting Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977)).

110. *Id.* at 229-30. Justice Powell commented that Ewing's interest was "not closely tied to 'respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.' " *Id.* at 230 (quoting Griswold v. Connecticut, 381 U.S. 479, 501 (1965)).

111. *See* Reich v. Beharry, 883 F.2d 239 (3d Cir. 1989), discussed *infra* at notes 142-55 and accompanying text; *see also* Charles v. Baesler, 910 F.2d 1349 (6th Cir. 1990), discussed *infra* at notes 156-66 and accompanying text.

III. CIRCUIT COURT DEVELOPMENT: FORUM OVER FORM

The very language of the Due Process Clause protects property coextensively with life and liberty.[112] But to assert, as a tautology, that an interest is "property" and is thus explicitly protected by substantive due process begs the question.[113] Although the Supreme Court does not foreclose the application of substantive due process to all property interests, Justice Powell's refusal to extend protection to less-than-fundamental interests has been explicitly adopted by some circuit courts.[114] The lack of guidance provided by the Court has resulted in differing circuit court analyses that have added to the confusion.[115] However, these analyses have provided some insight into both the sources and the limits of the application of substantive due process to property rights.

A. Acceptance and Application: Substantive Protection for Property Interests

Some circuit courts, particularly the Eighth and Ninth Circuits, will permit substantive due process claims for arbitrary and capricious deprivations of property rights.[116] Nonetheless, the decisions of these two circuits are characterized by intra-circuit inconsistency.[117] Therefore, the decisions fail to provide a definitive resolution of whether and when arbitrary deprivations of property rights trigger substantive due process protection.

In *Moore v. Warwick Public School District No. 29*,[118] the United States Court of Appeals for the Eighth Circuit examined a claim by a dismissed public school superintendent who alleged that the school district illegally terminated him because of his glaucoma-related blindness.[119] After Moore refused the school's request that he resign, the school board discharged him

112. "[N]or shall any State deprive any person of life, liberty, or property, without the due process of law." U.S. CONST. amend XIV, § 1.

113. Justice Powell's refusal to extend substantive due process to less-than-fundamental property interests suggests a bifurcated approach to due process protection for property that fails to find support from the language or the history of the Clause. *See infra* notes 204-06 and accompanying text.

114. *See infra* notes 152-53, 163-66 and accompanying text.

115. *See Charles*, 910 F.2d at 1354 (collecting cases); *see also Reich*, 883 F.2d at 243-44 (surveying the differing analyses of the several circuit courts that have considered the question).

116. Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990); Moore v. Warwick Pub. Sch. Dist. No. 29, 794 F.2d 322 (8th Cir. 1986).

117. *See infra* notes 128, 141.

118. 794 F.2d 322 (8th Cir. 1986).

119. *Id.* at 323.

upon a unanimous vote.[120] Moore brought suit under § 1983, alleging both procedural and substantive due process violations.[121] The district court granted summary judgment for the school district, holding that the *Parratt* rule barred Moore's procedural claim.[122] The district court further found that Moore failed to meet his burden of establishing that his dismissal was arbitrary.[123]

The Eighth Circuit reversed on both claims.[124] After finding that Moore's procedural claim was not barred by the *Parratt* rule,[125] the court considered the substantive due process claim. The court found that *Harrah Independent School District v. Martin*[126] controlled Moore's case, based on the similarity between the facts of *Harrah* and the allegations in Moore's complaint.[127] Without reaching the merits, the court held that under *Harrah*, Moore alleged a "cognizable substantive due process claim" and remanded the case to the district court for consideration consistent with *Harrah*.[128]

In *Sinaloa Lake Owners Ass'n v. City of Simi Valley*,[129] the Owners Association brought a suit for damages under § 1983. The complaint alleged, in

---

120. *Id.*

121. *Id.*

122. The district court reasoned that because Moore had an adequate post-deprivation remedy in a state court breach of contract claim, the procedural requirements of due process had been satisfied. *Id.* at 326.

123. *Id.* at 328.

124. *Id.* at 330. The panel ruled that the district court's sua sponte grant of summary judgment was improper. *Id.* at 325.

125. The circuit court held that *Parratt* did not apply unless the district court first determined whether Moore was entitled to a pre-termination hearing. *Id.* at 326. *See supra* note 50 (discussing why a post-deprivation remedy is relevant only where pre-deprivation process is not a constitutional requirement). The court held that pre-deprivation process was not "impossible," and remanded the claim to the district court for consideration under the test enunciated in Mathews v. Eldridge, 424 U.S. 319, 335 (1976). *See supra* note 39.

126. 440 U.S. 194 (1979). The *Moore* court did not mention *Ewing*, which was released two months prior to the circuit court's consideration.

127. *Moore*, 794 F.2d at 329. The *Moore* holding is admittedly a narrow one. The court prefaced its holding by conceding that the Eighth Circuit had not definitively recognized the existence of such substantive due process rights. The holding was then specifically premised on the facts of *Harrah*. *Id.* The court was interested only in determining whether Moore had an "actionable substantive due process claim." *Id.*

128. Substantive due process claims, however, are still viewed with skepticism in the Eighth Circuit:

> This court . . . has placed a heavy burden on one wishing to extend the substantive due process doctrine into new arenas. The conduct involved must "shock [the] conscience or otherwise offend our judicial notions of fairness." It must be conduct "offensive to human dignity." We have yet to decide whether substantive due process provides a right to be free from arbitrary and capricious state action.

Weimer v. Amen, 870 F.2d 1400, 1405 (8th Cir. 1989) (citations omitted).

129. 882 F.2d 1398 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990).

part, that the defendants violated the Owners Association's due process rights when they evacuated the residents of the lake and breached the Association-owned dam after determining that the water level was dangerously high.[130] The dam breach occurred without notice to the residents, and after the City gave assurance that it would not be breached.[131] The district court granted the defendants a judgment on the pleadings on ripeness grounds.[132] The United States Court of Appeals for the Ninth Circuit examined the claims de novo and reversed.[133]

The circuit court first disposed of the procedural due process claim, holding that the breach was an "emergency procedure" and that pre-deprivation process was therefore not a constitutional requirement.[134] The court then embarked on a lengthy analysis of the plaintiffs' substantive due process claim, and held that the plaintiffs, by alleging that officials "destroy[ed] the dam for no legitimate reason," had stated a colorable claim.[135] In reaching this result, the court began with an expansive view of due process jurisprudence based on "the full scope of the liberty guaranteed by the Due Process Clause . . . which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . ."[136] The court then set out its preliminary standard for the substantive due process claim—whether "the government's action was 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.' "[137]

---

130. *Id.* at 1401. The Owners Association owned both the dam in question and the lake behind it. The City evacuated the residents after heavy rains led to an accumulation of water that caused two slides on the face of the dam. *Id.*

131. *Id.* at 1408.

132. *Id.* at 1401. In their complaint, the plaintiffs alleged both an unconstitutional taking under the Fifth Amendment and a due process violation under the Fourteenth Amendment. *Id.* at 1404. The district court held that the plaintiffs failed to exhaust administrative remedies and, thus, the claims were not ripe. *Id.* at 1402. The circuit court upheld the district court's ruling with respect to the takings claim, but reversed on the due process claim, holding that the exhaustion requirement did not apply to the plaintiffs' Fourteenth Amendment claims. *Id.* at 1403-04.

133. *Id.* at 1401-02, 1411.

134. *Id.* at 1406; *see supra* note 41 and accompanying text. The panel also considered whether the *Parratt* rule barred the claim. *Id.* at 1405. The court held that *Parratt* did not bar the claim because the defendants could not allege random, unauthorized action where the decision to breach the dam was made by senior officials pursuant to a state statute. *Id.*

135. *Id.* at 1410.

136. *Id.* at 1409 (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting), *quoted with approval in* Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977) (plurality opinion)).

137. *Id.* at 1407 (quoting Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)). Thus, the court directly applied the Supreme Court's test for the validity of land-use

Mindful of the countervailing government interests at stake, the court posited a balancing test to determine, based on the circumstances, whether the state violated the plaintiffs' substantive due process rights. The test balanced "the need for the governmental action in question, the relationship between the need and the action, the extent of harm inflicted, and whether the action was taken in good faith or for the purpose of causing harm."[138] The court then remanded the case for trial.

B. Reluctance and Rejection

In *Regents of University of Michigan v. Ewing*,[139] Justice Powell, in concurrence, admonished, "[t]he history of substantive due process 'counsels caution and restraint.' "[140] The lack of direct guidance from the Court in the *Harrah* and *Ewing* decisions has resulted in circuit court holdings marked by hesitancy and doubt.[141]

In *Reich v. Beharry*,[142] the United States Court of Appeals for the Third Circuit considered a deprivation of a property right, and declined to recognize a seemingly compelling claim of malicious abuse of governmental

---

regulations to an official's act under the state's code. The plaintiffs challenged not the code provision, but the reasonableness of the official action.

138. *Id.* at 1409. These factors are an adaptation of a test posited in Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973), quoted *infra* at note 229. Although the circuit court on remand did not offer the district court any guidance on the use of the test, the court elaborated on the competing interests at stake, and conceded that "governmental entities must have much latitude in carrying out their police power responsibilities; mere errors of judgment, or actions that are mistaken or misguided, do not violate due process. But malicious, irrational and plainly arbitrary actions are not within the legitimate purview of the state's power." *Sinaloa*, 882 F.2d at 1409.

139. 474 U.S. 214 (1985).

140. *Id.* at 229 (Powell, J., concurring) (quoting *Moore*, 431 U.S. at 502). This caution is manifest in the Court's repeated warning that federal courts should not "make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." Paul v. Davis, 424 U.S. 693, 701 (1976); *accord* Daniels v. Williams, 474 U.S. 327, 332 (1986); Parratt v. Taylor, 451 U.S. 527, 544 (1981).

141. In Lum v. Jensen, 876 F.2d 1385 (9th Cir. 1989), *cert. denied*, 493 U.S. 1057 (1990), the court examined whether substantive due process protection for property interests in public employment was "clearly established" for the purposes of a qualified immunity claim. *Id.* at 1386-87. The court, in considering the status of the case law at that time, noted that some of the circuits

> either left the issue open, summarily addressed the issue and found no violation, or held explicitly that there was no substantive due process right. The First and Third Circuits refused to address whether such a right existed, expressly leaving the question open because the cases presenting the question did not involve a property interest sufficient to trigger any due process protection.

Id. at 1387.

142. 883 F.2d 239 (3d Cir. 1989).

power.[143] Reich was an attorney appointed by the county as a special prosecutor to investigate and prosecute alleged wrongdoing by Beharry, the County Controller.[144] The County Controller was authorized, in her discretion, to approve payment on county contracts.[145] When Reich billed the county for services rendered, Beharry twice refused to authorize Reich's compensation.[146] At a County Salary Board meeting, Beharry alone voted against confirming Reich's appointment and salary, calling Reich a "hired gun."[147] Reich then filed a § 1983 action alleging violations of procedural and substantive due process. The district court subsequently granted Beharry's motion to dismiss for failure to state a claim.[148] On appeal, the United States Court of Appeals for the Third Circuit assumed, without deciding, that Reich had a protected property interest,[149] and affirmed the district court's dismissal of Reich's procedural due process claim.[150] The court then considered Reich's substantive due process claim that Beharry's "personal animosity" motivated her refusal to pay.[151]

The court began by considering the nature and importance of Reich's asserted property interest, and accorded it substantially less significance than other interests that had been refused substantive due process protection by

143. *Id.* at 245.

144. *Id.* at 239.

145. *Id.* at 240.

146. *Id.*

147. *Id.* at 241.

148. *Id.* The district court, without determining "whether Beharry's act was 'random and unauthorized,' " held that Reich's claim was barred by *Parratt*. *Id.* The Third Circuit upheld the district court's dismissal of the procedural due process claim on other grounds. *See infra* note 150.

149. *Id.* at 242. The court, however, was skeptical at the existence of a property right where Reich's interest, at most, was in the receipt of prompt payment without having to litigate a breach of contract claim in state court. *Id.* at 243. For further discussion on the propriety of recognizing property rights based on government contract expectancies, see S & D Maintenance Co. v. Goldin, 844 F.2d 962, 966-67 (2d Cir. 1988).

150. *Reich*, 883 F.2d at 243. The court applied the *Mathews* test and found that, given the large number of invoices processed by the county, the costs of providing notice and a hearing prior to a refusal to pay outweighed the usefulness of any such process in preventing an erroneous refusal. *Id.* The court held that pre-deprivation process was not required under the circumstances, and that Reich's state law remedy for breach of contract provided him with constitutionally adequate process. *Id.* at 242-43.

151. *Id.* at 243.

the court.[152] Sharing Justice Powell's doubt[153] about the protection of a less-than-fundamental interest,[154] the panel then held that there was no independent basis for recognizing a substantive due process claim for the deprivaton of Reich's property interest.[155]

Similarly, in *Charles v. Baesler*,[156] the United States Court of Appeals for the Sixth Circuit considered a contract-based property interest and found that it was not entitled to substantive due process protection.[157] The plaintiff-appellant Charles brought suit under § 1983, alleging that the City's refusal to promote him within the fire department violated due process where Charles' name appeared at the top of an eligibility list for promotion.[158] Charles based his property right on the relevant statutes and ordinances that governed such promotions.[159] The district court held that the statute conferred upon Charles a legitimate claim of entitlement to the promotion, and thus a contractually-based property right protected by procedural due process.[160] The circuit court left this finding undisturbed.[161]

---

152. In Ransom v. Marrazzo, 848 F.2d 398 (3d Cir. 1988), the same circuit held that a legitimate claim of entitlement to continued utility service—a property right previously recognized by the Supreme Court in Memphis Light, Gas, & Water Div. v. Craft, 436 U.S. 1 (1978)—would not support a substantive due process claim. In *Ransom*, the issue was whether city policy violated substantive due process where the city conditioned the receipt of utility service on payment of overdue charges incurred by the prior occupant of the premises. *Ransom*, 848 F.2d at 411-12. However, in *Ransom*, there was no arbitrary or wrongful act by a government official. The court also cited Mauriello v. University of Medicine & Dentistry, 781 F.2d 46 (3d Cir. 1986), a case involving an academic dismissal similar to the facts in *Ewing*. The panel in *Mauriello* gave particular weight to the concurrence in *Ewing*, "shar[ing] Justice Powell's doubt about the existence of such a substantive due process right" under the circumstances. *Id.* at 52. The *Mauriello* court, however, like the Court in *Ewing*, assumed the existence of the right, reached the merits of the claim, and found no arbitrary or capricious action. *Id.*

153. The *Reich* panel echoed the doubt of the circuit's opinion in *Mauriello*. *See supra* note 152.

154. *Reich*, 883 F.2d at 244.

155. *Id.* at 245.

156. 910 F.2d 1349 (6th Cir. 1990).

157. *Id.* at 1353.

158. *Id.* at 1350-52. The government's personnel director failed to replace an expired eligibility list with a new eligibility list. Had the personnel director done so, Charles would have been absolutely entitled to the promotion. *Id.*

159. Ordinances in effect guaranteed that if a vacancy was announced for promotion, and the mayor did not abolish the vacancy within ninety days, the person to appear first on the promotion list would be promoted. *Id.* at 1350. The mayor failed to abolish the vacancy within ninety days, and Charles, who appeared first on the list, would have been promoted. Instead, the government failed to appoint anyone, and eventually abolished the vacancy. *Id.* at 1351.

160. *Id.* at 1352.

161. *Id.*

The panel then addressed the district court's finding that Charles' right to promotion implicated the protection of substantive due process.[162] The court acknowledged the Supreme Court's decision in *Ewing*, which implied that arbitrary deprivations of property might violate due process, but explicitly adopted Justice Powell's position and refused to recognize substantive due process protection for interests of less-than-fundamental significance.[163] Operating under the premise that only "fundamental" interests receive substantive due process protection, the court broadly held that "run-of-the-mill" contract-based property rights fail to qualify as fundamental,[164] reasoning that "neither liberty nor justice would [cease to] exist if [they] were sacrificed."[165] The court then rejected Charles' claim, holding that Charles' interest failed to qualify as "fundamental."[166]

C. Application to Parratt*-barred Claims*

Academics disagree over the fundamental import of *Parratt* and whether application of the *Parratt* rule to a procedural due process claim should also control substantive due process claims.[167] The most compelling of these per-

---

162. The circuit court did not characterize Charles' claim as one of "arbitrary and capricious" conduct. Charles had an absolute right to the promotion itself that was not subject to official discretion. Thus, the court phrased the issue as whether Charles could constitutionally be denied promotion at all. *Id.* at 1352-53. Assumedly, however, the City's refusal to promote Charles without legitimate reason, despite his continued eligibility and absolute right, would constitute arbitrary action. *See supra* notes 77-79 and accompanying text.

163. *Id.* at 1354; *see supra* notes 104-06 and accompanying text.

164. The court sought to distinguish Charles' claim that he was arbitrarily denied promotion from claims arising in the context of a tenured employee's termination. *Id.* at 1355. Relying on circuit precedent, the court urged that the "ready availability of routine state-law remedies [is] one useful factor in determining whether a given interest should be recognized as constitutionally fundamental." *Id.* (citing Ramsey v. Board of Educ. of Whitley County, 844 F.2d 1268, 1274-75 (6th Cir. 1988)). However, Supreme Court precedent teaches otherwise: " '[p]roperty' cannot be defined by the procedures provided for its deprivation any more than can life or liberty." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1986) (discussing procedural due process); *see also* Zinermon v. Burch, 494 U.S. 113, 125 (1990) (reiterating that substantive due process claims are complete when the arbitrary action occurs, without regard to the adequacy of state-provided procedures).

165. *Charles*, 910 F.2d at 1353 (quoting Bowers v. Hardwick, 478 U.S. 186, 194 (1986)). The court elaborated that "any claim that Charles' right to promotion . . . is deeply rooted in our national history and tradition is both legally and historically indefensible." *Id.*

166. In dicta, the court noted:

> [W]e do not conclude that all state-created contract rights lack substantive due process protection. For example, substantive due process may well protect a contract right to keep a tenured job, although it may also be, in light of the fact that "substantive due process rights are created only by the Constitution," that tenure is in fact a protected fundamental *liberty* interest once it is conferred by contract.

Id. at 1355 (citations omitted).

167. Professor Nahmod concludes that *Parratt* is limited to and justifiable only within procedural due process, because "substantive due process challenges are challenges to governmen-

spectives suggests that in cases where *Parratt* bars the procedural due process claim, permitting a substantive due process claim for arbitrary government action would effectively overrule *Parratt*.[168] The United States Court of Appeals for the Fifth Circuit, in *Schaper v. City of Huntsville*,[169] held precisely that.

In *Schaper*, a former police captain brought suit under § 1983 alleging that he was unconstitutionally terminated from his public employment.[170] Schaper claimed that a politically-motivated city manager conspired with the police chief to remove Schaper, and that the city manager, in reviewing the termination decision, was biased.[171]

The Fifth Circuit, in reviewing the district court's denial of summary judgment, first considered Schaper's procedural due process claim.[172] After finding that Schaper had a constitutionally protected property interest in employment,[173] the panel held that the *Parratt* rule barred Schaper's claim that the bias in his pre-deprivation hearing denied him constitutionally adequate process.[174] The alleged conspiracy and bias, the court reasoned, constituted "random and unauthorized conduct" and, thus, the state was not in a position to prevent the wrongful deprivation.[175] Because the City provided

---

tal conduct itself, irrespective of the absence of hearings." Nahmod, *supra* note 27, at 252-53. Other scholars argue that *Parratt* should be overruled or redefined because the theory of *Parratt*—that some instances of official misconduct do not violate due process—cannot be reconciled with the other "components" of due process. Monaghan, *supra* note 27, at 994.

168. *See* Schaper v. City of Huntsville, 813 F.2d 709 (5th Cir. 1987), discussed *infra* at notes 169-84 and accompanying text. *See also* Kauth v. Hartford Ins. Co. of Ill., 852 F.2d 951 (7th Cir. 1988), discussed *infra* at notes 185-99 and accompanying text.

169. 813 F.2d 709 (5th Cir. 1987).

170. *Id.* at 712.

171. Schaper was suspended without pay after an indictment for falsifying automobile title documents. *Id.* at 711-12. Schaper claimed that he entered a plea of nolo contendere based on the city manager's alleged assurance that Schaper would avoid termination. *Id.* at 712. The chief of police subsequently resigned after being indicted for the same fraud. *Id.* The replacement chief was allegedly involved in the conspiracy. *Id.*

172. *Id.* at 713-16.

173. *Id.* at 713-14.

174. *Id.* at 716.

175. *Id.* at 715. The court's holding—that *Parratt* bars claims based on inadequate procedures resulting from a biased decision-maker—represents a truly remarkable result. Where the state explicitly vests the decision-maker with authority to effect the deprivation, the characterization of the deprivation as "unauthorized" seems anomalous when compared with the facts of *Parratt*, *see supra* notes 45-48 and accompanying text, and the Court's recent holding that *Parratt* does not apply to deprivations arising from an "established state procedure" or "by an official's abuse of his position." Zinermon v. Burch, 494 U.S. 113, 130-31 (1990). Although the court's reliance on *Parratt* may be misplaced, the same result—that a post-deprivation remedy can satisfy due process—can be reached if the facts of *Schaper* are analyzed under the *Mathews* factors. *See supra* note 39. Such an analysis suggests that biased decision-making, much like a random and unauthorized act, is virtually impossible for the state to

an "appeal as of right," the court concluded, Schaper received all of the process that was due, and thus no procedural due process violation occurred.[176]

The court then turned to Schaper's substantive due process claim and held that any such claim, if it existed, was implicitly barred by *Parratt*.[177] The court noted that *Parratt* does not bar "substantive due process" claims based on an incorporated right,[178] but that "random and unauthorized conduct" might vitiate a substantive due process claim where the plaintiff alleges arbitrary and capricious action.[179] The panel then compared the substantive interests protected by the Bill of Rights with the interest that Schaper asserted and found that, while the incorporated rights enjoy protected status independent of the Due Process Clause, Schaper's asserted interest derived from state law, and not the Constitution.[180] Thus, the court held, Schaper merely advanced his *Parratt*-barred procedural claim under the substantive due process name.[181] The court then refused to allow Schaper's claim, because to recognize it would permit plaintiffs to allege arbitrary and capricious state action in cases where the *Parratt* rule barred actions based on a "random and unauthorized" act.[182] To hold otherwise, the court reasoned,

---

predict or prevent. Thus, "the value of predeprivation safeguards . . . is negligible in preventing the kind of deprivation at issue." *Zinermon*, 494 U.S. at 129.

176. *Schaper*, 813 F.2d at 716.

177. *Id.* at 718. The court cited *Ewing* and *Harrah*, as well as precedent from within the Fifth Circuit, but did not conclude whether an arbitrary and capricious deprivation of Schaper's right to continued employment would constitute a substantive due process claim. *Id.* at 716-17. Rather, the court advanced to the question whether *Parratt* barred the substantive claim. *Id.* The Fifth Circuit does, however, recognize such claims. In Honore v. Douglass, 833 F.2d 565 (5th Cir. 1987), a university professor was refused tenure and subsequently terminated with constitutionally adequate procedure. "[D]espite this finding of procedural adequacy," the court held,

> we do not agree with the trial court's rejection of the substantive due process claim. To reach the jury with his substantive due process claim, Honore must demonstrate a genuine issue of material fact about his protected property interest (entitlement to vested tenure) and the university's arbitrary or capricious deprivation of that interest.

Id. at 568.

178. *Schaper*, 813 F.2d at 717. For a convincing argument that the *Parratt* Court implicitly excluded the incorporated rights from its holding, see Nahmod, *supra* note 27, at 233-34.

179. *Schaper*, 813 F.2d at 718.

180. *Id.*

181. *Id.* The court held that "Schaper's substantive rights mirror his procedural rights, and under either theory he cannot allege a violation at the pretermination stage of the process." *Id.*

182. *Id.*

would effectively overrule *Parratt*.[183] The court then ruled that the availability of a meaningful post-deprivation remedy again satisfied due process.[184]

The United States Court of Appeals for the Seventh Circuit relied on *Schaper* to reach the same holding in *Kauth v. Hartford Insurance Co. of Illinois*.[185] In *Kauth*, the plaintiff brought suit under § 1983 after the state seized Kauth's property pursuant to a court-ordered writ of attachment.[186] After the sheriff executed the facially valid writ of attachment, the state's intermediate court of appeals vacated the writ upon discovering that the writ was issued on the basis of a defective affidavit.[187] The court, however, failed to order the return of Kauth's property, which was subsequently sold at an auction.[188]

The district court granted the defendants' motion to dismiss, citing Kauth's failure to state a constitutional claim.[189] The Seventh Circuit affirmed, holding that Kauth's procedural due process claim was barred by *Parratt*'s post-deprivation remedy rationale, and therefore Kauth's substantive due process claim must fail as well.[190]

In denying Kauth's procedural claim, the Seventh Circuit first noted that the state attachment statute mandated a prompt post-attachment hearing for

---

183. *Id.*

184. *Id.* at 718. The court's prior holding in Holloway v. Walker, 784 F.2d 1287 (5th Cir. 1986) expands upon this line of reasoning. In *Holloway*, the plaintiff alleged a deprivation of property by a biased state court judge. *Id.* at 1288. Although the facts of *Holloway* implicated the fundamental and independent "right to a fair trial," the underlying rationale of *Holloway* and *Schaper* is identical. The *Holloway* court reasoned at length that:

> [The plaintiffs] argue that a fair trial is "implicit in the concept of ordered liberty," and that a judicial conspiracy to deprive litigants of their property "shocks the conscience."
>
> Assuming for the sake of this analysis that plaintiffs established a judicial conspiracy, the resultant shocked conscience cannot displace common sense. That sense dictates that the right to an impartial judge is a matter of procedural, not substantive, due process. To hold otherwise would be to fictionalize solely for the purpose of avoiding application of *Parratt/Hudson* a situation to which *Parratt/Hudson* was clearly meant to apply, i.e., where a plaintiff is deprived of his property by the unexpected, unauthorized act of a state employee. As the district court noted, the effect of accepting plaintiffs' argument would be to hold that although a person fails to state a due process claim by complaining that he was deprived of property without due process (under *Parratt/Hudson*), he nonetheless states a due process claim by complaining he was not provided due process while being deprived of his property. We cannot undermine *Parratt/Hudson* in this way.

Id. at 1293-94 (citations omitted).

185. 852 F.2d 951 (7th Cir. 1988).

186. *Id.* at 952-53.

187. *Id.* at 953.

188. *Id.*

189. *Id.* at 954.

190. *Id.* at 958.

aggrieved parties.[191] Kauth had received several such hearings.[192] Holding that these post-deprivation hearings satisfied due process, the court cited *Parratt* to hold that Kauth received constitutionally adequate procedure.[193]

The court then proceeded to analyze Kauth's claim from a substantive due process perspective. After noting the Supreme Court's open-ended decision in *Ewing*, the *Kauth* court expressed reluctance to recognize such claims without further Supreme Court guidance.[194] Further, the court found that allowing such claims would encourage plaintiffs to avoid *Parratt* by framing their claims in substantive due process terms.[195] The panel then cited *Parratt* and *Schaper* to hold that Kauth could not state a due process claim for an arbitrary deprivation of property.[196] However, the *Kauth* court barred the claim not because the deprivation was random or unauthorized, but solely because the state provided a post-deprivation remedy for make-whole relief.[197]

The *Kauth* court went further, however, and developed a rule. A plaintiff cannot state a due process violation for arbitrary or capricious deprivations unless the plaintiff also alleges either a violation of a separate constitutional right or that the state law remedies are constitutionally inadequate.[198] Thus, because Kauth did not attack the adequacy of the available post-deprivation remedies, and because no other constitutional interest was implicated, the court held that Kauth could not state a due process claim.[199]

IV. Making Sense of the Mire

The foregoing cases raise several salient questions. What is the source of this substantive due process protection for property? Is it based on the significance of the interest, as Justice Powell counsels? If so, does the protection cover only those interests the Court deems "fundamental?" Or, is the freedom from arbitrary and capricious deprivations of property absolute, as posited by the Ninth Circuit in *Sinaloa*? Further, are substantive due pro-

191. *Id.* at 955.

192. *Id.*

193. *Id.* at 955-56. Although the circuit court cites *Parratt*'s adequate post-deprivation remedy exception as dispositive, the court did not inquire whether pre-deprivation process was possible or practical under the circumstances. *Id.* at 955. *See supra* note 50. The court's dismissal is perhaps better explained by its finding that Kauth failed to attack the constitutional adequacy of the process the state afforded. *Id.* at 955-56.

194. *Id.* at 956.

195. *Id.* at 957.

196. *Id.* at 957-58.

197. *Id.* at 958. The panel cited Kauth's failure to argue that the state tort remedies were not constitutionally adequate. *Id.*

198. *Id.*

199. *Id.*

cess claims for arbitrary and capricious deprivations of property vitiated where the *Parratt* rule bars the procedural due process claim based on the same property right? If so, why?

A. An Unconditional Freedom From Arbitrary Action?

The Supreme Court has discussed the general purpose of the Due Process Clause in language confirming that the Fourteenth Amendment creates a right to be free from "certain arbitrary, wrongful government actions."[200] Indeed, this substantive right is the "touchstone of due process."[201] In *Daniels v. Williams*,[202] the Court gave a brief historical overview of the Due Process Clause. Comparing the Clause to the Magna Carta, then-Justice Rehnquist remarked that both were "intended to secure the individual from the arbitrary exercise of the powers of government."[203]

Further, the Court has not suggested a basis or justification for discriminating among property interests, but has nonetheless implied that non-fundamental property interests do trigger substantive due process protection.[204] Thus, the proposition that only *some* property interests are entitled to substantive due process protection suggests a dichotomy that has no basis in either precedent or the history of the Clause.[205] Nevertheless, certain appel-

200. Zinermon v. Burch, 494 U.S. 113, 125 (1990); *see* Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting), quoted *supra* note 77.

201. Wolff v. McDonnell, 418 U.S. 539, 558 (1974); *see* Dent v. West Virginia, 129 U.S. 114, 123-24 (1889) (noting that the purpose of due process is to "secure the citizen against any arbitrary deprivation of . . . rights").

202. 474 U.S. 327 (1986).

203. *Id.* at 331 (citing Hurtado v. California, 110 U.S. 516 (1884) (quoting Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 244 (1819))).

204. *See supra* text accompanying notes 92-94, 106. In Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), a regulatory takings case, the Court defined and limited real property interests in a way that blurs many principled distinctions between real property and entitlement based interests. Both types of interests are equally dependent upon "existing rules or understandings that stem from an independent source such as state law." *Id.* at 2901 (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).

205. Professor Norman Karlin elaborates on the Due Process Clause-Magna Carta comparison:

> Rights were owned by the people, as individuals, and never dichotomized into personal and property. It was to the contrary. The principle established by the Magna Carta and thus basic to the common law and later to the Constitution was the identification of liberty and property. Ownership of property was evidence of liberty. In solemn ceremony, it was there decreed that neither the King nor government could take property except *per legem terrae*. The reach was not procedural but substantive. Coke in his writings used the phrase interchangeably with "due process of law;" and, in this form, the concept was included in the fifth amendment of the United States Constitution. Life, liberty and property comprised an invulnerable trilogy . . . .

Norman Karlin, *Back to the Future: From* Nollan *to* Lochner, 17 SW. U. L. REV. 627, 637-38 (1988) (footnotes omitted).

late circuits insist that the substantive component of the Clause protects only fundamental interests.[206]

B. A Function of Property?

In *Ewing*[207] and *Harrah*,[208] the Supreme Court did not further elaborate on the source and nature of the due process rights it applied in each case. The Court assumed that the mutual understanding between Ewing and the university gave Ewing a property right in continued enrollment.[209] Ewing's subsequent dismissal presumably triggered the due process protection from arbitrary decision making.[210] In his concurrence, however, Justice Powell, intimates that he would discriminate among property interests on the basis of whether an asserted interest is "fundamental"[211] and deny substantive due process protection to interests that he considers less important.[212] In *Ewing*, the unanimous Court did not discuss whether Ewing's property right was "fundamental," and instead centered the opinion on the latitude that federal courts must accord academic board decisions.[213] The Court proceeded to the merits of the case, and decided that the school's action was not arbitrary.[214]

In support of his position, Justice Powell cited to prior Supreme Court decisions in which the Court carefully assessed the fundamental significance of the asserted interest before according it substantive due process protec-

---

206. Charles v. Baesler, 910 F.2d 1349, 1355-56 (6th Cir. 1990); Reich v. Beharry, 883 F.2d 239, 244-45 (3d Cir. 1989); Kauth v. Hartford Ins. Co. of Illinois, 852 F.2d 951, 957-58 (7th Cir. 1988).

207. Regents of Univ. of Michigan v. Ewing, 474 U.S. 214 (1985). For a full discussion of the case, see *supra* notes 95-111 and accompanying text.

208. Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194 (1979) (per curiam). For a full discussion of the case, see *supra* notes 83-94 and accompanying text.

209. *Ewing*, 474 U.S. at 223.

210. *Id.*

211. Justice Powell opined that "[t]he interest asserted by [Ewing]—an interest in continued enrollment from which he derives a right to retake the [exam]—is essentially a state-law contract right. It bears little resemblance to the fundamental interests that previously have been viewed as implicitly protected by the Constitution." *Id.* at 229-30 (Powell, J., concurring).

212. *Id.* at 229.

213. *Id.* at 225-27. In *Harrah*, however, the Court seemed to consider Justice Powell's limiting criteria but did not apply it:

> [T]here is no claim that the interest entitled to protection as a matter of substantive due process was anything resembling "the individual's freedom of choice with respect to certain basic matters of procreation, marriage, and family life." Rather, respondent's claim is simply that she, as a tenured teacher, cannot be discharged under the School Board's purely prospective rule . . . ."

Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194, 198 (1979) (citations omitted).

214. *Ewing*, 474 U.S. at 227-28.

tion.[215] This fundamental interest inquiry, however, blurs the analysis, because the fundamental interest consideration applied by the Court in those prior substantive due process cases was relevant to whether an interest constituted a particularly important type of *liberty* interest[216] entitled to *heightened* judicial scrutiny.[217] Ewing, on the other hand, sought review of whether the deprivation of his *property* interest was *arbitrary*.[218]

C. The Problem with Property

Courts that adopt the fundamental rights approach as the watershed for cognizability of the due process claim do so at the risk of permitting egregious official abuses to go unredressed. The Third Circuit, in *Reich v. Beharry*,[219] expressed serious doubts about the entitlement-based interest asserted as property by Reich.[220] The panel characterized it as only an interest in receiving his compensation without the delay caused by litigation for breach of contract.[221] The *Reich* panel assumed that Reich's interest constituted property, but held that Reich's interest was an insignificant one that falls outside the limits of substantive due process protection that Justice Powell advocates.[222]

Given the nature of the government action at issue, the denial of Reich's substantive due process claim appears unjust when based solely on the "insignificance" of the property interest. *Reich*'s property deprivation was allegedly motivated by the malicious, spiteful vengeance of a government

215. Justice Powell cites to Moore v. East Cleveland, 431 U.S. 494 (1977) (plurality opinion); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

216. *See* Bodensteiner & Levinson, *supra* note 106, at 438-39. Professors Bodensteiner and Levinson compared the "arbitrary and capricious" standard utilized by the Court in *Ewing* with Seventh Circuit cases that limited substantive due process claims to conduct that "shocked the conscience" of the court. *Id.*

217. One commentator argues that the *Ewing* Court *was* applying a heightened form of scrutiny by inquiring whether the university's decision to dismiss Ewing was "such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment." Stuart Biegel, *Reassessing the Applicability of Fundamental Rights Analysis: The Fourteenth Amendment and the Shaping of Educational Policy After* Kadramas v. Dickinson Public Schools, 74 CORNELL L. REV. 1078, 1092 (1989) (quoting *Ewing*, 474 U.S. at 227). *But see* JOHN E. NOWAK AND RONALD D. ROTUNDA, CONSTITUTIONAL LAW, § 10.6, at 341 n.3 (4th ed. 1991) (characterizing the standard in *Ewing* as highly deferential to the university).

218. *Ewing*, 474 U.S. at 223.

219. 883 F.2d 239 (3d Cir. 1989).

220. *Id.* at 242.

221. *Id.* at 245.

222. Judge Posner of the United States Court of Appeals for the Seventh Circuit might argue that such a contract expectation cannot constitute property, where the only remedy the state provides is a post-breach action for damages. Vail v. Board of Educ., 706 F.2d 1435, 1449-50 (7th Cir. 1983) (Posner, J., dissenting), *aff'd*, 466 U.S. 377 (1984).

official with broad discretionary authority—precisely the sort of governmental abuse of power that the Clause is intended to reach.[223] Where such abusive action is manifest, the significance of the property interest then seems an inadequate barometer for determining the cognizability of the due process claim.[224]

D. Evaluating the Government Action

In an effort to place reasonable limits on the use of substantive due process for deprivations of protected interests, the Supreme Court and some circuit courts have given significant, if not controlling weight, to the nature of the governmental action. In *Rochin v. California*,[225] the Supreme Court reviewed a procedure whereby the police forced a criminal suspect to undergo a stomach pumping to determine whether the suspect had swallowed illegal drugs. The Supreme Court held that the police conduct "shocked the conscience"[226] and thus violated "substantive due process."[227] Although *Rochin* involved a liberty interest in being free from bodily intrusions,[228] several circuit courts use some form of the *Rochin* standard when analyzing substantive due process claims for property deprivations.[229] The Eighth Circuit explicitly adopts the *Rochin* language in considering the recognition of novel claims.[230] The District of Columbia Circuit requires plaintiffs to show "grave unfairness."[231] The Ninth Circuit considers, among other factors,

---

223. *See supra* notes 200-203 and accompanying text.

224. However, "the nature of the interest affected is critical in analyzing the rationality of the government's conduct." Bodensteiner & Levinson, *supra* note 106, at 438-39.

225. 342 U.S. 165 (1952).

226. *Id.* at 172.

227. *Id.*

228. *See* TRIBE, *supra* note 34, § 11-3, at 775.

229. Although the Court has not overruled *Rochin*, the Court would most likely analyze the conduct in *Rochin* under the incorporated Fourth Amendment (freedom from unreasonable search and seizure) or Eighth Amendment (freedom from cruel and unusual punishment), rather than under "substantive due process" analysis. Graham v. Connor, 490 U.S. 386, 393-94 (1989). Prior to *Graham*, an alternative test used for excessive force claims was articulated by the Second Circuit in Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973):

> [Consider] the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Id. For the proposition that the *Rochin* standard should be adapted for application to all substantive due process claims, see Wells & Eaton, *supra* note 27, at 226-28.

230. *See* Weimer v. Amen, 870 F.2d 1400, 1405 (8th Cir. 1989). The *Weimer* court added that the conduct must be "offensive to human dignity." *Id.*

231. *See* Silverman v. Barry, 845 F.2d 1072, 1080 (D.C. Cir.), *cert. denied*, 488 U.S. 956 (1988). In this zoning case, the *Silverman* court held that, "[o]nly a substantial infringement

whether the government action was taken "for the purpose of causing harm."[232]

The nature of the government's action is the consideration that goes directly to the arbitrary and capricious "touchstone" of due process.[233] The aforementioned "shocks the conscience" and "grave unfairness" tests, while perhaps providing a sure indicator of when due process is violated, are too stringent when compared to the "arbitrary and capricious" standard[234] used by the Supreme Court in *Harrah*[235] and *Ewing*.[236]

E. The Parratt *Rule and Post-deprivation Remedies*

The *Parratt* rule addresses government action. *Parratt*, in a nutshell, means that "random and unauthorized" government action can vitiate the requirement of pre-deprivation process,[237] thus permitting an adequate post-deprivation remedy at state law to satisfy due process.[238] If *Parratt* similarly governs due process claims for arbitrary deprivations, the rationale might be found in the rule itself.

1. Random and Unauthorized Acts

Perhaps the question whether *Parratt* can bar a substantive due process claim is contingent upon whether "random and unauthorized" government action can constitute "arbitrary and capricious" use of government power.[239] "Random and unauthorized" conduct, for the purposes of *Parratt*, defies easy definition. Clearly, in *Kauth v. Hartford Insurance Co. of Illinois*,[240] the sheriff was not "authorized" to auction property attached by

---

of state law prompted by personal or group animus, or a deliberate flouting of the law that trammels significant personal or property rights, qualifies for relief under § 1983." *Id.*

232. Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1409 (9th Cir. 1989) (citing *Johnson*, 481 F.2d at 1033). The Ninth Circuit adapted the *Johnson* four-part test to substantive due process claims generally. *See supra* note 138 and accompanying text.

233. *See supra* note 201 and accompanying text.

234. The Court's use of the "shocks the conscience" standard implies not mere arbitrariness, but reprehensible abuse. William Burnham, *Separating Constitutional and Common-Law Torts: A Critique and a Proposed Constitutional Theory of Duty*, 73 MINN. L. REV. 515, 529 (1989).

235. Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194, 198-99 (1979) (per curiam).

236. Regents of Univ. of Michigan v. Ewing, 474 U.S. 214, 223 (1985).

237. *See* Parratt v. Taylor, 451 U.S. 527, 541 (1981). *See supra* notes 45-50 and accompanying text.

238. *See supra* note 50.

239. *See* Schaper v. City of Huntsville, 813 F.2d 709, 718 (5th Cir. 1987). *See infra* note 253 and accompanying text.

240. 852 F.2d 951 (7th Cir. 1988).

a writ invalidated three months before the auction.[241] In *Schaper v. City of Huntsville*,[242] a biased decision-maker was a "random occurrence." However, the Supreme Court defines "random and unauthorized" differently. The Court has determined that a "state official . . . acting pursuant to any established state procedure" does not constitute random action.[243] Under such a procedure, "[a]ny erroneous deprivation will occur, if at all, at a specific, predictable point in the . . . process."[244] The Court has further defined "unauthorized" conduct. Though it loosely describes conduct not sanctioned by state law,[245] the term does not apply to a "depriv[ation] of constitutional rights . . . by an official's abuse of his position."[246] Thus, although it is assumed that the state does not authorize one in a position of delegated power to exercise that power in an abusive fashion, the state's grant of power precludes a finding that the action was "unauthorized;"[247] such an official is in a position to provide or follow procedural safeguards.[248] Accordingly, where a state actor is empowered to effect the deprivation, it is no answer that he or she did so in a manner inconsistent with the state's grant of power.[249]

---

241. The *Kauth* court did not inquire whether the deprivation was random or unauthorized. *See supra* note 193.

242. 813 F.2d 709 (5th Cir. 1987).

243. Zinermon v. Burch, 494 U.S. 113, 130 (1990).

244. *Id.* at 136.

245. *Id.* at 138.

246. *Id.* (quoting Monroe v. Pape, 365 U.S. 167, 172 (1961)). The *Zinermon* court reasoned:

> [P]etitioners cannot characterize their conduct as "unauthorized" in the sense the term is used in *Parratt* and *Hudson*. The State delegated to them the power and authority to effect the very deprivation complained of here . . . and also delegated to them the concomitant duty to initiate the procedural safeguards set up by state law . . . . In *Parratt* and *Hudson*, the state employees had no similar broad authority to deprive prisoners of their personal property, and no similar duty to initiate . . . the procedural safeguards required before deprivations occur.

Id.

247. The Court carefully distinguished between delegated power and acts by unempowered employees. *Zinermon*, 494 U.S. at 135, 138.

248. Laura Oren, *Signing Into Heaven:* Zinermon v. Burch, *Federal Rights, and State Remedies Thirty Years After* Monroe v. Pape, 40 EMORY L.J. 1, 18-19 (1991). *See infra* note 249.

249. In Home Tel. and Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913), the Court reasoned that when a state official "in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the [Fourteenth] Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant" *Id.* at 287. Similarly, in Monroe v. Pape, 365 U.S. 167 (1961), the Court held that § 1983 reaches actions by "those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Id.* at 171-72. Professors Tribe and Monaghan read *Parratt* as a divergence from settled "state action" theory as set forth in the above quotes from *Home Telephone* and *Monroe*. *See* TRIBE, *supra* note 34, § 10-14, at 730-31; Monaghan,

Similarly, the due process prohibition against arbitrary and capricious government action contemplates an official exercise of power.[250] Thus, where the abusive actor is a government official acting pursuant to a state grant of power, the arbitrary and capricious claim may lie, irrespective of whether the state officially sanctions the act.[251] Conversely, one who is not empowered by the state to affect property rights cannot be said to abuse power not granted. Therefore, it appears that "random and unauthorized" action, as defined in *Parratt* and more recently in *Zinermon v. Burch*,[252] can never be colorable as an arbitrary and capricious exercise of power.[253]

Under the foregoing definition of "random and unauthorized," and with respect to the Supreme Court's opinion in *Ewing*, an official act that effects a deprivation of property is colorable as a due process violation on two grounds: (1) the state failed to canalize the exercise of official power with adequate procedural safeguards, or (2) the official based the decision to deprive on arbitrary or other constitutionally impermissible considerations. To view *Parratt* as a bright-line distinction between state-empowered officials and other state employees[254] is merely to recognize that a certain factual scenario—a random, unauthorized act—evades inquiry into whether due process accompanied the deprivation.[255] Nonetheless, the Supreme Court

---

supra note 27, at 994-95. Both urge this premise in cases where the state shields from liability some "unauthorized" official acts that would otherwise constitute Fourteenth Amendment violations under *Home Telephone* and *Monroe*. The Court's opinion in *Zinermon* evidences an attempt to wrestle the definition of "random and unauthorized" into an interpretation that falls within the ambit of *Home Telephone* and *Monroe*, holding that the *Parratt* line of cases

> [does] not stand for the proposition that in every case where a deprivation is caused by an "unauthorized . . . departure from established practices," state officials can escape § 1983 liability simply because the State provides tort remedies. This reading of *Parratt* and *Hudson* detaches those cases from their proper role as special applications of the settled principles expressed in *Monroe* and *Mathews*.

Zinermon, 494 U.S. at 138 n.20 (1990) (citation omitted). *But see infra* note 255.

250. *See supra* notes 77, 79. *See also* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 277 (1856) (explaining that the purpose of the Fifth Amendment Due Process Clause is to prevent governmental power from being "used for purposes of oppression").

251. *See* TRIBE, *supra* note 34, § 3-25, at 177, n.25.

252. *See supra* notes 243-48 and accompanying text.

253. *See* Monaghan, *supra* note 27, at 994. Professor Monaghan speculated that " 'random' [may be] a term of art, and *Parratt* collapses into little more than a distinction between acts of 'lower echelon state employees . . . and high ranking officials.' " *Id.* (quoting Dwyer v. Regan, 777 F.2d 825, 832 (2d Cir. 1985)). With this hypothesis in mind he concluded, without attempting to define "random and unauthorized," that a wholesale recognition of a substantive due process claim for "arbitrariness" would effectively overrule *Parratt*. Monaghan, *supra* note 27, at 994.

254. See *supra* notes 243-46, 253 and accompanying text.

255. Professor Oren is in accord with this reading of *Parratt/Zinermon*:

> *Parratt*'s "random and unauthorized" standard, therefore, focuses on different kind of state authority than *Monroe* does. *Zinermon* teaches that where pre-deprivation

holds the state constitutionally accountable for random, unauthorized deprivations[256] by requiring due process in the form of an adequate post-deprivation remedy at state law.[257]

2. *Constitutionally Adequate Post-deprivation Remedies*

The Seventh Circuit panel in *Kauth v. Hartford Insurance Co. of Illinois*[258] did not rely on *Parratt*'s random and unauthorized conduct distinction.[259] Rather, the *Kauth* court held that the availability of an adequate post-deprivation remedy precludes a finding that an arbitrary or capricious deprivation violates due process.[260] The adequate post-deprivation remedy inquiry in *Parratt* recognizes that the state can nonetheless provide due process by affording make-whole relief for erroneous deprivations of property.[261] This suggests a different explanation for why *Parratt* might bar due process claims for arbitrary deprivations.

Kauth's holding muddles *Ewing*'s substance-procedure distinction.[262] Under the Seventh Circuit's rule, the state can provide due process by affording an adequate post-deprivation remedy for any abusive deprivations of property that could constitute a due process violation under *Ewing*.[263] In

---

> process is practicable and state officials have the power to afford it, their acts are not "random and unauthorized" . . . . This reasoning puts *Parratt* in its place, as a special case that applies to unusual circumstances.

Oren, *supra* note 248, at 19.

256. Oren, *supra* note 248, at 22.

257. *See supra* note 50.

258. 852 F.2d 951 (7th Cir. 1988).

259. *See supra* note 193.

260. *Kauth*, 852 F.2d at 958.

261. *See* Parratt v. Taylor, 451 U.S. 527, 544 (1981) (holding that a post-deprivation tort remedy at state law "could have fully compensated [Taylor] for the property loss he suffered"). *See also* Bonner v. Coughlin, 517 F.2d 1311, 1319 (7th Cir. 1975), *modified en banc*, 545 F.2d 565 (1976), *cert. denied*, 435 U.S. 932 (1978) (dismissing the due process claim because the "plaintiff [was] entitled to be made whole for any loss of property occasioned by the unauthorized conduct").

262. The court reasoned "that in cases where the plaintiff complains that he has been unreasonably deprived of a state-created property interest, without alleging . . . that the available state remedies are inadequate, the plaintiff has not stated a substantive due process claim." *Kauth*, 852 F.2d at 958.

In *Parratt*, the Supreme Court collapsed the distinction more cryptically by holding only that Taylor failed to allege "a violation of the Due Process Clause." Monaghan, *supra* note 27, at 985-86. In so holding, the *Parratt* Court "abandon[ed] its prior discussion of due process in a plainly procedural sense." *Id.*

263. The panel concluded:

> Kauth does not dispute that availability of adequacy of the tort remedies that he could have pursued in an Illinois state court. Therefore, because Kauth's complaint alleges only a due process violation and does not allege that the defendants violated

Kauth, the Seventh Circuit derives from *Parratt*'s rationale a requirement that the plaintiff either pursue such a remedy or allege the inadequacy of said remedy, even where the court found no random or unauthorized conduct.[264] By requiring pursuit of a state remedy, the Seventh Circuit applies *Parratt* as a general exhaustion-of-remedies requirement.[265] Such an exhaustion requirement has no basis in the language or interpretation of § 1983.[266] The Seventh Circuit's alternative—that the plaintiff allege the inadequacy of the state remedy—applies *Parratt* as a "ripeness" requirement[267] by refusing to recognize a colorable due process claim until the state's system fails to remedy the arbitrary deprivation.[268] However, such a ripeness requirement apparently contradicts settled § 1983 precedent.[269] Further, many state-created interests constitute property only because the state courts will enforce the substantive limitations on power that form the basis of the entitle-

---

any other substantive provision of the Constitution, we must leave Kauth to his state remedies.

Kauth 852 F.2d at 958.

264. *See supra* notes 197-98 and accompanying text.

265. *See* Monaghan, *supra* note 27, at 988-89 (discussing how the *Parratt* Court wrote in terms of exhaustion).

266. "Section 1983 . . . specifies no exhaustion requirement." Jett v. Dallas Ind. Sch. Dist., 491 U.S. 701, 748 (1989) (Brennan, J., dissenting). And the Court has not, with few exceptions, required § 1983 plaintiffs to pursue state administrative remedies. *See* Webb v. Board of Educ., 471 U.S. 234, 247 & n.5 (1985) (Brennan, J., concurring in part and dissenting in part).

267. The Court in *Zinermon* used such words of "ripeness" in its discussion of procedural due process. *See infra* text accompanying note 278.

268. Leonard Kreynin, *Breach of Contract as a Due Process Violation: Can the Constitution be a Font of Contract Law?*, 90 COLUM. L. REV. 1098, 1113 (1990).

269. Applying the ripeness concept to all claims for arbitrary deprivations would upset the established precedent in Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913) and Monroe v. Pape, 365 U.S. 167 (1961). Although the *Zinermon* Court defined random and unauthorized in a way that accommodates the state action doctrine formulated in those two cases, *see supra* note 249, a wholesale application of ripeness concepts "contradicts the direct holding of *Monroe* that state remedies 'need not be first sought and refused' before a federal remedy is properly invoked." Kreynin, *supra* note 268, at 1113 (quoting *Monroe*, 365 U.S. at 183). Professor Monaghan states more broadly that "[n]o authority supports use of ripeness doctrine to bar federal jurisdiction of an otherwise sufficiently focused controversy simply because corrective state judicial process had not been invoked." Monaghan, *supra* note 27, at 989.

ment.[270] Therefore, a ripeness requirement denies immediate federal jurisdiction over arbitrary or abusive deprivations of such interests.[271]

Kauth, however, *can* be explained in due process terms. *Kauth* does not completely dissolve the substance-procedure distinction. Rather, *Kauth* suggests that the distinction is illusory—that protection from arbitrary and capricious deprivations *is* the root function of due process, but that the reach of due process is purely procedural.[272]

Under the *Kauth* model, due process requires the states to afford preventive pre-deprivation safeguards whenever practicable.[273] *Parratt* recognizes that under certain circumstances pre-deprivation process is impracticable—random and unauthorized action is one such circumstance.[274] *Kauth* extends *Parratt*'s rationale to circumstances that can render ineffective even the most stringent procedural safeguards—arbitrary abuse of power is such a circumstance.[275] In each case, the provision of additional pre-deprivation procedures would not significantly decrease the likelihood of a wrongful deprivation.[276] Thus, the only process a state can provide is a means for fully compensating the person for the "substance" of the property illegally de-

---

270. One commentator expanded upon this irony:

> If no right remediable in state courts exists, then no property interest is implicated and no due process rights arise. If, on the other hand, a right remediable in state court *is* found, then the state provides all the process that is constitutionally due. The case that might succeed [in invoking § 1983 jurisdiction] would be the exceedingly rare case in which the state explicitly provides a right without a remedy or in which the remedy in state court is structurally deficient or discriminates against federal rights.

Kreynin, *supra* note 268, at 1114.

271. *Id.*

272. Professor Scanlon views this substance-procedure distinction as one of name and not of nature, arguing that the "procedural" component of due process encompasses both the implementation of pre-deprivation procedures that safeguard against errors *and* the provision of post-deprivation appeals that remedy such errors. Scanlon, *supra* note 79, at 97-98.

273. *See supra* note 39.

274. *See supra* note 50.

275. The four dissenting justices in *Zinermon* argued forcefully that *Parratt*'s definition of random and unauthorized conduct should control such abuses. Justice O'Connor wrote that "[t]he state actor so indifferent to guaranteed protections would be no more prevented from working the deprivation by additional requirements than would the mail handler in *Parratt* or the prison guard in *Hudson*." Zinermon v. Burch, 494 U.S. 113, 144 (1990) (O'Connor, J., dissenting).

276. Justice O'Connor demonstrates how a *Mathews* analysis suggests a similar result for arbitrary acts:

> The allegedly wanton nature of the subversion of the state procedures underscores why the State cannot in any relevant sense anticipate and meaningfully guard against the random and unauthorized actions alleged in this case. . . . The Court's characterization omits [the government official's] alleged wrongful state of mind and thus the nature and the source of the wrongful deprivation.

Id. at 142-43 (O'Connor, J., dissenting).

prived.[277] A § 1983 plaintiff can then state a colorable due process claim under *Kauth* only by alleging procedural inadequacy: either the pre-deprivation procedures were inadequate to prevent the error or the post-deprivation procedures were inadequate to remedy the error. The Supreme Court's dicta in *Zinermon* then takes on a very traditional gloss: "The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; *it is not complete unless and until the State fails to provide due process.*"[278]

V. COMMENT: TOWARD A MORE COHERENT STANDARD

If the Seventh Circuit is correct, what are the consequences? Clearly the application of an assumed "substantive" due process right in *Harrah* and *Ewing* should then be regarded as anomalous. The *Harrah* and *Ewing* Courts did not inquire whether the state failed to provide due process, did not afford fundamental status to the interest at stake, and only reviewed the state's decision for arbitrariness.[279] Also, *Rochin*'s "shocks the conscience" standard would be discarded.[280] Whether official conduct "shocks the conscience" or is merely arbitrary would be irrelevant if the Constitution requires no further pre-deprivation process and the state remedy will fully compensate the plaintiff.[281] Cases like *Euclid*,[282] however, are unaffected. *Euclid* involved a challenge to a zoning ordinance, not to an official's action.[283] Where the government act is legislative in nature, such laws of general application are tempered not by preventive procedures but by the "due process" of the ballot box.[284]

Kauth's analysis further elucidates *Parratt*. Although *Kauth* and *Parratt* share the same due process rationale, random, unauthorized acts and arbitrary abuses of government power must be analyzed differently. The unpredictability of random and unauthorized deprivations by unempowered state

277. *See supra* notes 49-50 and accompanying text.

278. *Zinermon*, 494 U.S. at 126.

279. *See supra* notes 92, 104 and accompanying text.

280. Rochin v. California, 342 U.S. 165, 172 (1952).

281. *See supra* notes 92, 104-05 and accompanying text. Alternatively, the conscience-shocking bodily search in *Rochin* might be better characterized as a violation of the incorporated Fourth or Eighth Amendment rights that the Court finds fundamental. *See supra* note 229. Under *Kauth*, the availability of post-deprivation remedies are irrelevant where a fundamental right is affected. Kauth v. Hartford Ins. Co. of Ill., 852 F.2d 951, 958 (7th Cir. 1988). Monroe v. Pape, 365 U.S. 167 (1961), goes unscathed for the same reason. *Monroe* involved a § 1983 action for a warrantless search, arrest and subsequent detention, and thus *Monroe*'s holding—that "state remedies need not be sought and refused"—is consistent with *Kauth*. *Id.* at 183.

282. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

283. *Id.* at 384.

284. Scanlon, *supra* note 79, at 97, 101.

employees renders pre-deprivation safeguards impossible to provide at all.[285] Accordingly, *Parratt* completely negates the state's constitutional duty to provide pre-deprivation process where the act is random and unauthorized.[286]

Arbitrary abuses of government power, however, are predictable because the state itself delegated the official power to identifiable persons in particular situations.[287] Thus, *Kauth* does not relieve the state of its constitutional duty to implement pre-deprivation process.[288] Where an official flouts the state's pre-deprivation procedures, the provision of further safeguards is possible but may be futile.[289] Accordingly, a plaintiff alleging an arbitrary deprivation under *Kauth* can still claim that the pre-deprivation process was either required or inadequate, while under *Parratt* a plaintiff must concede that the state cannot implement such procedures at all. If a court following *Kauth* applies the Supreme Court's procedural due process test in *Mathews v. Eldridge*,[290] and determines that further pre-deprivation process is not constitutionally required, then *Parratt*'s post-deprivation remedy rationale controls the rest of the analysis.[291] A post-deprivation procedure that can fully compensate the plaintiff for the loss then provides all of the process that's due.[292]

However, if *Harrah* and *Ewing* were correctly decided, then *Parratt* retains its special application. *Zinermon*'s limited definition of "random and unauthorized acts" excludes official exercises of delegated power. Thus, the Supreme Court has an option if it chooses to review another claim for an arbitrary deprivation of state-created property interests. If the Court chooses to rely on *Zinermon*'s bright-line distinction between random, unauthorized acts and official exercises of power, then the Court might use *Ewing* as a vehicle for holding that all arbitrary deprivations of property are colorable as due process claims. Alternatively, the Court can adopt *Kauth*'s extension of the *Parratt* rationale to arbitrary deprivations, thereby reserving "substantive" due process as a doctrine for vindicating official abuses of power that impinge on fundamental rights.

---

285. *See supra* note 50.

286. Zinermon v. Burch, 494 U.S. 113, 129 (1990).

287. Oren, *supra* note 248, at 19.

288. Kauth v. Hartford Ins. Co. of Ill., 852 F.2d 951, 958 (7th Cir. 1988). The *Kauth* court dismissed the claim because Kauth failed to attack the adequacy of the state's procedures. *Id.*

289. *See Zinermon*, 494 U.S. at 144 (O'Connor, J., dissenting) (remarking that further procedures would not have guarded against an official "indifferent to guaranteed protections").

290. Mathews v. Eldridge, 424 U.S. 319, 335 (1976); *see supra* note 39.

291. *See supra* note 50.

292. *See supra* notes 49-50 and accompanying text.

Several factors suggest that the present Court will choose the latter approach. First, *Kauth* is consistent with the *Parratt* Court's refusal to "make of the Fourteenth Amendment a font of tort law to be superimposed on whatever systems may already be administered by the states."[293] Second, the four dissenters in *Zinermon v. Burch*[294] define "random and unauthorized" in a way that extends to arbitrary decision-making and abuses of power.[295] The Court, however, should retain the majority's bright-line distinction between truly random and unauthorized acts and official departures from established procedure. The Court's definition of "random and unauthorized" permits a dispositive determination under *Mathews* that the state cannot provide pre-deprivation process.[296] Lastly and most importantly, *Kauth* brings internal coherence to due process jurisprudence. *Kauth* shifts the inquiry away from a subjective evaluation of the official act and focuses on the objective adequacy of the state's procedures under *Mathews*. Irrespective of a court's characterization of the state actor, the ultimate constitutional question is whether the state's procedures adequately promote the goal of due process—the guarantee against arbitrary government.[297]

In cases where a plaintiff alleges a deprivation of a protected interest, the due process inquiry under *Kauth* is both straightforward and settled. First, a court must objectively analyze the circumstances surrounding the deprivation in order to characterize the state action. Such an analysis reveals that the act responsible for the deprivation was either an exercise of delegated power or a random and unauthorized act.

Second, the court must apply the three-factor test of *Mathews v. Eldridge*[298] to determine whether pre-deprivation process is required and, if so, whether the process provided is constitutionally adequate. If a random and unauthorized act makes the provision of pre-deprivation safeguards impossi-

293. Parratt v. Taylor, 451 U.S. 527, 666 (1981) (quoting Paul v. Davis, 424 U.S.693, 701 (1976)).

294. 494 U.S. 113 (1990).

295. Justice O'Connor wrote for the Chief Justice and Associate Justices Scalia and Kennedy in *Zinermon*, which the Court decided prior to the departure of Associate Justices Brennan and Marshall. *Id.* at 139. The dissent takes the majority to task for defining *Parratt*'s random and unauthorized acts exclusive of exercises of delegated power. *Id.* at 145. Justice O'Connor used reasoning that would bring arbitrary abuses within the reach of *Parratt*: "Petitioners' actions were unauthorized: they are alleged to have wrongly and without license departed from established state practices. . . . [I]t is alleged that petitioners "with willful, wanton and reckless disregard of and indifference to" Burch's rights contravened . . . established state procedure." *Id.* at 141-42 (citations omitted).

296. *See supra* note 50.

297. *See supra* note 74 and accompanying text.

298. *See supra* note 39 and accompanying text.

ble, then analysis under *Mathews* results in a determination that such safeguards are not constitutionally required.[299]

Conversely, where an empowered official causes a deprivation, pre-deprivation process is *always* possible. Analysis under *Mathews* then enables a court to determine whether the pre-deprivation process afforded is constitutionally adequate, or that due process requires something more. Such an analysis may, however, suggest that more process could not have prevented the official malfeasance. However, a determination under *Mathews* that further preventive process is both possible *and* practicable completes the due process claim.[300]

Conversely, a determination that such process is impossible, futile, or otherwise not required shifts the inquiry to whether the state provides a procedure that can fully compensate the plaintiff for all provable losses. The inquiry into the adequacy of the post-deprivation remedy involves a comparison between the available state law compensatory remedies and the types of compensation available to § 1983 plaintiffs.[301]

For example, if a plaintiff alleges that the deprivation caused emotional distress but the relevant state tribunal is powerless to compensate plaintiffs for such damages, the state remedy is constitutionally inadequate.[302] The remedy is constitutionally inadequate because due process entitles a plaintiff to such compensation under § 1983.[303] Conversely, if the state's remedy en-

---

299. *See supra* note 50.

300. *See* Zinermon v. Burch, 494 U.S. 113, 138-39 (1990) (holding that the deprivation was foreseeable, and thus, that further pre-deprivation process would not be impossible).

301. Kevin G. Chapman, Parratt v. Taylor *Revisited: Defining the Adequate Remedy Requirement*, 65 B.U. L. REV. 607 (1985). Courts must fully consider whether the state remedy can fully compensate the plaintiff for any harm caused. *Id.* at 633. This "strict adequacy" requirement may be applied on a case-by-case basis. *Id.* at 635-37.

302. In a pre-*Parratt* case the Court held that "mental and emotional distress caused by the denial of procedural due process itself is compensable under § 1983 . . . with[] proof that some injury was actually caused." Carey v. Piphus, 435 U.S. 247, 264 (1978).

303. *See* Rutherford v. United States, 702 F.2d 580, 584 (5th Cir. 1983). *Rutherford* was an action brought to recover taxes, and the plaintiff further alleged harassment by a government official. *Id.* at 581. The district court held that the administrative remedies for recovery of overpayments were constitutionally adequate. *Id.* at 582. The United States Court of Appeals for the Fifth Circuit reversed, holding that the remedies were not adequate:

> The plaintiffs ask in recompense for the agent's abuses not a return of their taxes—*that* remedy they sought in their associate proceeding against the government—but damages for the grief the Agent is said to have caused . . . . The statutory machine for refund make no allowance for mental anguish caused by harassment.

Id. at 584 (citation omitted). *Rutherford* was a *Bivens* action under the Due Process Clause of the Fifth Amendment and not a § 1983 claim under the Fourteenth Amendment. *Id.* at 582. *Bivens* actions are § 1983-like constitutional claims brought pursuant to Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), which permits a constitutional cause of action

titles the plaintiff to compensation for all provable losses, the state provides all of the process that's due.

A necessary corollary derived from the above analysis is that the plaintiff need not demonstrate that he or she could win in state court. Section 1983 plaintiffs need not demonstrate governmental arbitrariness or abuse to prevail on a claim that the state violated due process.[304] A plaintiff need only show that the state failed to provide all of the process that's due.[305]

VI. CONCLUSION

The Due Process Clause of the Fourteenth Amendment protects individuals from deprivations of state-created interests effected by an arbitrary or abusive exercise of governmental power. Neither the history of the Clause nor Supreme Court precedent supports a proposition that a property interest must have near fundamental import to trigger this protection. Indeed, precedent and history provide no alternative but that all property interests are entitled to the due process protection from arbitrary government.

Whether a due process violation occurs, however, does not hinge upon whether the state's use of power was reasonable or arbitrary. Rather, the question is whether the state failed to provide due process. The question entails only a test of the state procedures for constitutional adequacy. Inquiry into the government action that effects the deprivation is then limited to characterization of the government actor. Such a characterization provides the factual context for analysis under *Mathews v. Eldridge*.

The Supreme Court nonetheless holds that due process also bars "certain arbitrary, wrongful government actions 'regardless of the procedures used to implement them.' " Such actions, however, violate due process only if they impinge on constitutionally-created rights. Such rights are those so important that the Supreme Court ranks them as fundamental. Substantive review of official acts under a "due process" rubric should be limited accordingly.

Craig W. Hillwig

---

against a federal agent. Chapman, *supra* note 301, at 632. Thus, the *Rutherford* court's reasoning mirrors that for a § 1983 claim. *Id.* at n.168.

304. Justice Stevens wrote for a unanimous Court:

> Our cases do not support . . . [a] reading of § 1983 as requiring proof of an abuse of governmental power separate and apart from the proof of a constitutional violation. Although [§ 1983] provides the citizen with an effective remedy against those abuses of state power that violate federal law, it does not provide a remedy for abuses that do not violate federal law. More importantly, the statute does not draw any distinction between abusive and non-abusive federal violations.

Collins v. Harker Heights, 112 S. Ct. 1061, 1065 (1992).

305. *See supra* note 278 and accompanying text.